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James W. Gordon

Western New England University School of Law, jgordon@law.wne.edu

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THE POPULAR IMAGE OF THE AMERICAN LAWYER: SOME THOUGHTS ON ITS EIGHTEENTH AND NINETEENTH CENTURY INTELLECTUAL BASES

JAMES W. GORDON*

I. INTRODUCTION

Americans have always had ambivalent feelings about lawyers. Almost every generation has expressed its distaste for this profession which lives by subtlety and conflict, but each generation has put its most important public and private affairs into the hands of persons trained to the law. This fact is true whether one looks to positions of private or public power. Nowhere has the bar been so heavily criticized and in no other place have its members had such honors and power bestowed upon them.

Almost forty years ago, James Willard Hurst noted the ambiguous position of the lawyer in American society when he observed: "Whether mistaken, unjust, or hypocritical, the unfavorable popular image of the lawyer was a reality throughout our social history. It contrasted oddly with the people's readiness to make a place at the bar an object of public honor and private ambition."¹ What are the sources of this ambivalence? What intellectual currents have produced such mixed and yet such intense feelings?

This essay will explore the ambiguous position lawyers occupy in the popular mind in America by identifying some of the ideas which contributed to the schizophrenic popular attitude toward the legal profession in the period between the American Revolution and the Civil War. Many of the stock anti-lawyer themes and many of the intellectual sources of the profession's strength are clearly visible by the end of this period. I propose to explore this problem, first by relating it to recent scholarship in American history describing the struggle between republicanism and liberalism at the time of the Founding. The way the profession was ground between these ideals, attacked by one, championing and then apparently betraying the goals of the other, illustrates well the process which has shaped the image of lawyers in the United States.

Other points of contact have contributed to the complexity of lay attitudes toward lawyers. Some illustrated the usefulness of lawyers. Many produced resentment. Still others did both, depending on the perspective of

* Professor of Law, Western New England College School of Law. B.A. 1971, University of Louisville; J.D. 1974, Ph.D. 1981, University of Kentucky. The author would like to express his appreciation to Howard I. Kalodner, Dean of Western New England College School of Law, for supporting this project with a summer research grant. The author also wishes to thank his colleagues Anne B. Goldstein and Arthur D. Wolf for reading earlier drafts of this essay and offering helpful comments.

1. J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 252 (1950).

the viewer. Among the points I will discuss are attitudes toward change, autonomy, reason, human nature, and law itself. Ultimately, I will argue that although lawyers were more hated than loved, their indispensability was widely recognized.

Americans' attitude toward change colored attitudes toward law and lawyers. For republicans, change brought decline. They feared it, and believed lawyers to be among its most effective proponents. Lawyers became for agrarian republicans one of the most important symbols of modernization in the early republic. Because lawyers and the adversary system they served were at the cutting edge of the liberal displacement of republicanism, this republican fear was grounded, at least partially, in fact. The bar espoused values which were extremely individualistic, and the legal changes which suffused the law in the first half of the nineteenth century helped accelerate the explicit developments late eighteenth century republicans most feared. Republicans imagined that lawyers, in pursuit of their professional interests or as agents of others, worked relentlessly at undermining the social and economic bases of republicanism. There was some truth to this charge.²

The republican perception was a powerful source of anti-lawyer sentiment in the early republic. However, as change in American society accelerated in the first half of the nineteenth century management of change became critically important. Common lawyers had always mediated and concealed change. Law and lawyers met this need by providing necessary continuity and stability. The law in their hands incorporated change while maintaining contact with the past. Even dramatic changes in society and particularly in the economy could be accommodated by relatively small changes in legal doctrine. If nineteenth century America was a society undergoing a truly revolutionary transformation, law and lawyers cloaked many of the changes in evolutionary language. By doing so, lawyers satisfied a deep conservative desire for order in an increasingly chaotic world.³

As champions of liberal individualism, the legal profession drew strength from the emerging, dominant economic and political ideology of the United States. What agitated republicans, earned respect from liberals. Lawyers spoke for the victors. The ascendancy of lawyers and the multiplication of laws which accompanied the triumph of liberalism, however, eventually undercut individual autonomy, the most important of the benefits promised by liberalism. Legal complexity and the emergence of legal constraints on personal action divided lawyers from their liberal allies.

The post-Enlightenment apotheosis of reason encouraged the entrusting of decisionmaking to reasoning men, and lawyers proclaimed their expertise in this field. Many, however, believed this a false claim. Often Americans

2. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); W. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975).

3. See M. MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 33-56 (1960).

were tempted to attack the intricacies and complexities of the common law, most of which the bar defended. If this strange product of lawyers' reasoning called the common law was irrational; either legal reasoning was sophistic or lawyers were dishonest. If the common law method was false, lawyers were guilty either of ignorance or hypocrisy, and possibly of a conspiracy against laymen as well. The cost of legal representation and the disempowerment which accompanied litigation reinforced these suspicions. It was a small step to the conclusion that lawyers served no one but themselves.

The difference between lawyer and nonlawyer conceptions of law reinforced initial discomfort. The lay idea of law rested upon a natural law foundation and led nonlawyers to view lawyer manipulation of positivist legal principles as further evidence of dishonesty and selfishness. Yet, despite this tension lawyers consolidated their private and public power. The elevation of the profession was completed when the lawyers consolidated their monopoly on law during the late eighteenth and early nineteenth centuries. The profession was able to elevate itself partly because the triumph of liberal individualism made the restraint provided by law indispensable. Having undermined other institutions which traditionally had served to tame the passions of man, Americans were left with nothing but law to serve this function. With the accelerating decline of communal institutions during the nineteenth and twentieth centuries, law, which had always been peculiarly important in America, became indispensable. Since Americans could not trust their neighbors, they were forced to depend on lawyers.

The profession made this reality more palatable to nonlawyers by convincing egalitarian-minded nineteenth century Americans that the bar's apparent elitism could be removed by opening it to anyone with talent. By persuading the Jacksonians that those who succeeded at the bar were worthy exemplars of emerging democratic principles and the accompanying American belief in the self-made man, the bar fought off a serious challenge to its special status and consolidated its position. This new professional egalitarianism, however, was a formula for the sharing of power among members of a more democratic profession. It was not a promise of equality between lawyers and laymen.

I do not mean to suggest that the abstractions I will discuss in this essay explain all criticism of the legal profession. Surely, direct experience with particular lawyers and with the adversary system accounted for some anti-lawyer sentiment. Many people must have experienced the legal system into which they were cast as incomprehensible, infuriating, frightening, and expensive. Since lawyers are the main channel through which nonlawyers experience our legal system, it is not surprising that lawyers have received the blame for that system's unpleasant features. It is a strange system. Lawyer champions fight, but when blows strike home, their clients bleed. It is easy to understand why a lay person who has experienced the adversary system directly may emerge from the encounter with a clear recollection of Justice's blindfold and little confidence in the quality of her scales.

My intention is not to minimize the part such experiences play in creating bar critics. For most of our history as a nation, however, only a

small percentage of the people alive at any given moment have had direct, professional contact with lawyers. This inescapable fact means that most Americans' perceptions of the bar have been shaped not by direct experience, but by the *repute* of the profession and by abstractions about lawyers.

Popular attacks on the bar and the rage these attacks express amplify and reverberate not because critic and listener share a common wretched experience, but because the critic's complaint taps a popular hostility toward lawyers which is *not* the result of experience. Here is the realm of ideas. Why have so many people without direct experience of lawyers been so ready to believe the worst about the legal profession? Equally perplexing is the complementary question: why do our countrymen abide and promote lawyers if Americans have so low an opinion of the bar? Answering both of these questions is the focus of this essay.⁴

II. UNCOVERING A "CULTURAL FAULT"

A. Community Versus Individualism

In a recent thoughtful essay on the dark image of lawyers in America, Robert Post examined some of the literary and psychological sources of antilawyer sentiment. Post suggested that the reasons for hostility toward lawyers should be sought along the "fault line" of the value conflict Americans experience as they struggle to reconcile an individual focused, competitive society with their longing for community. They want the freedom to get and keep, and to live selfishly without regard for the claims all may have upon each. But Americans also want the security of family-like interactions. As Post put it: "The lawyer is the public and unavoidable

4. The reader is due one further word of explanation concerning the assumptions upon which this essay rests. I have attempted to generalize my discussion beyond the limits of the period I cover so as to address attitudes toward the legal profession over time. Generalization always carries with it the risk of oversimplification. I am certainly aware that both the profession and American society have changed in dramatic ways since the middle of the nineteenth century. Also one must recognize that all ideas, including republicanism and liberalism, are organic.

Neither am I blind to the dangers created by moving freely back and forth among eighteenth and nineteenth century materials. However, it was not my intention to describe popular attitudes toward lawyers at any one time or place. Rather, I have tried to understand the sources and to integrate examples of popular ambivalence toward lawyers in general.

It will be clear to the reader that I also have assumed that contextually-based attitudes may persist even after the specific framework of ideas within which they originated has receded into historical memory. In particular, I have assumed that ideas originating in a republican world view left a cultural residue which helped to shape American cultural attitudes in the same way that childhood experiences shape adult personality. The adult is not always aware of the lattice of early experiences which constitutes a source of adult attitudes or opinions, but the connection is real and its reconstruction can help in understanding or explaining that adult's behavior. Ideas have a specific context, but they also become historical facts in that they affect subsequent generations upon whom they are imperfectly imprinted or to whom they are imperfectly transmitted.

embodiment of the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion. . . ."⁵

Post's hypothesis resonates powerfully with the central theme of Jerold Auerbach's provocative book, *Justice Without Law?*⁶ Auerbach observes that law and lawyers moved to the center of American life only after the dissolution of community.⁷

Auerbach argues that unless Americans can recapture what he calls a "coherent community vision," laymen will continue to suffer a self-imposed captivity to the legal profession, while brooding upon and lamenting the bar's power.⁸ Although he does not offer the analogy, one cannot help comparing the social fragmentation that Auerbach describes to the dissolution of individual families through divorce. Just as isolated individuals turn to lawyers for the regulation of their human relations when community has fled, so do spouses as they reproduce the disintegration of the larger family in the microcosm of the smaller. If, as Auerbach argues, "the law begins where community ends,"⁹ then we should scarcely wonder that Americans experience and articulate a profound ambivalence about lawyers. Law is for strangers, and those who believe that our society should offer more than isolation to its constituents flinch at entering the lawyer's realm and hate the lawyer for living there with so little apparent discomfort. Both Post and Auerbach seem to agree that lawyers are indispensable to a particular kind of society: one which Auerbach would characterize as fragmented and pernicious. One may note that the society he criticizes has always drawn fire from numbers of Americans who believe it to be badly out of joint.

The two ideals discussed by Post and Auerbach have taken concrete form in American history in competing models pitting individualism against community—the intellectual tradition represented by modern liberalism against the competing intellectual tradition of republicanism.¹⁰

5. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 389 (1987).

6. J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983).

7. *Id.* at 6, 69-94. Auerbach argues that Americans, as a people, have paid a price for their denial of a cooperative communitarian vision, a vision which has survived against great odds throughout American history. He discusses four historical examples of communities which functioned without law and lawyers. He observes that each had a powerful commitment to the value of community and so did not need them.

8. *Id.* at 4.

9. *Id.* at 5.

10. See J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790's* (1984); J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* 3-145 (1984); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); Appleby, *Introduction: Republicanism and Ideology*, 37 AM. Q. 461 (1985); Diggins, *Comrades and Citizens: New Mythologies in American Historiography*, 90 AM. HIST. REV. 614 (1985); Smith, *Liberalism*, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 276. The most

B. Liberal Individualism and Republican Communitarianism

1. Rediscovering Republicanism

Students of American society have been attuned to the presence and importance of the individualism-liberalism strand in American culture for a long time. No one questions its significance in understanding who we are. In contrast, the communitarian strand of our intellectual tradition has been largely ignored until recently. Only those American historians interested in communitarian utopianism studied this cooperative, if eccentric, counter-model of social organization. This changed dramatically in the mid-1960's when mainline intellectual historians in a series of provocative monographs rediscovered the communitarian-republican ideology of the revolutionary generation. Attempts since then to trace the influence of the republican tradition in later periods of American history have brought historians to a watershed, and have precipitated an ongoing scholarly debate over the relative importance of these competing paradigms in understanding American history. About one thing all must agree. Both of these paradigms, as well as others, have been at work in shaping the deep cultural attitudes of most Americans.¹¹ The performance of lawyers in America has generated hostility from both intellectual camps. In the eyes of republicans, lawyers destroyed community by encouraging and serving individual selfishness. More importantly, lawyers undermined the foundations of republicanism by promoting change and modernization. In the eyes of liberals, lawyers first helped to liberate individuals from state control and then undermined the resulting freedom by creating a web of law which eventually reenslaved them. For republicans, the legal profession was always an enemy, though individual lawyers could be friends. For liberals, the legal profession could be a partner, a servant, and a master, all at the same time. The liberal opinion of lawyers was much more ambivalent and changeable than that of republicans because it depended upon which facet of the liberal relationship with lawyers was prominent in a particular context. Republican ideas fueled much of the anti-lawyer sentiment in the early republic. Liberal ideas led to a much more complex relationship with the bar. This relationship always contained a strange mixture of respect and contempt, of trust and anxiety.

important discussion of the republican tradition remains G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). See also J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT IN THE ATLANTIC REPUBLICAN TRADITION* (1975); ROSS, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 116 (1979). The continuing scholarly discussion about the importance of these competing intellectual strands in the early history of America highlights the importance of both. See Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 WM. & MARY Q. 341 (1989).

11. See Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987) (for a thoughtful discussion of this idea).

Lawyers came to represent both what was best and worst about the emerging liberal philosophy.

Liberal historians, with their emphasis on the influence of John Locke, natural rights, and the Enlightenment, dominated the historiography on the American Revolution and the early development of the United States until the mid-1960's. Beginning with the work of Pauline Maier, J.G.A. Pocock, Bernard Bailyn, and especially Gordon Wood, however, the history of the Imperial Crisis between Britain and the American colonies, the Founding, and nineteenth century America, have been radically rewritten. Without entirely denying the importance of Locke and the liberal tradition in the development of the United States, these authors and others who have followed their lead have identified another, and in their view more important theme in the writings of eighteenth and early nineteenth century Americans.

This competing theme was republicanism. Republicanism was a distinctive blend of classical, Renaissance, and English "Country" thought. Eighteenth century Americans imbibed this mix of ideas by reading Machiavelli, seventeenth century English revolutionaries, and the writings of the early eighteenth century opponents of the centralization of Parliamentary power and the expansion of commerce under Robert Walpole.¹²

The conflict between scholars emphasizing the influence of republicanism on American intellectual and political development on the one hand, and those scholars arguing for renewed attention to the influence of a reformulated liberalism on the other, has generated in recent years a sometimes shrill debate among American intellectual historians.¹³

2. Virtue, Autonomy, and Their Enemies

The classical republican tradition, as shaped by those who transmitted it to America and as adapted by the Americans who received it, generally emphasized civic responsibility, selfless service to the polity, and the necessity of a virtuous citizenry. The heart of republicanism was communitarian. It focused upon the duties owed by individuals to the political community rather than on the enforcement of rights belonging to individuals against the community. "[R]epublicanism," wrote Dorothy Ross, "understood politics to be the chief end of human life and the arena in which men exercised

12. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); J. POCKOCK, *supra* note 10; G. WOOD, *supra* note 10.

13. See L. BANNING, *supra* note 12; Banning, *The Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 4 (1986); J. APPLEBY, *supra* note 10; Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986) (for an example of the disagreement); see Conklin, *Comment on Diggins, Comrades and Citizens: New Mythologies in American Historiography*, 90 AM. HIST. REV. 639 (1985); Diggins' *Reply*, 90 AM. HIST. REV. 644 (1985) (for an example of heat). See Kloppenberg, *supra* note 11.; Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (1988) (for a constructive synthesis).

and perfected their moral personality."¹⁴ In order to maximize personal satisfaction, man, as a social animal, must participate in public life and pursue the public good.

Underlying and indispensable to this ideal was economic independence. Only those who possessed sufficient property—usually perceived as productive land—were independent and autonomous enough to fulfill this obligation of citizenship.¹⁵ Of course, property ownership was also important to assure that those with a material stake in society would have control of public decisions. If a man were subject economically to the will of another, he was also politically dependent. Alexander Hamilton made this point explicitly in *The Federalist*: "There are men who could neither be distressed nor won into a sacrifice of their duty; but this stern virtue is the growth of few soils; and in the main it will be found that a power over a man's support is a power over his will."¹⁶

Unless a man was economically self-sufficient, he was unable to exercise independent judgment, and therefore unable to participate appropriately in the public life of the republic. Corruption, the great subverter of republics, was spawned as much by economic dependency as by excessive wealth. One man or group "bought" other men's loyalty and political support by appealing to individual selfishness. This corruption was accomplished through offers of economic rewards or office. By subverting a man's independence and his inclination to exercise his judgment in the pursuit of the public good, anti-republican factions arose to threaten liberty and the life of the republic.

Economic self-sufficiency was important not only as a means to the end of political autonomy. The possession of enough land to assure self-sufficiency was also an important end in itself for republicans. Close association with the soil, the farming, and management of land taught habits of simplicity, frugality, and personal independence.¹⁷ The cultivation of land resulted in the cultivation of private virtue. "Public virtue" rested upon private virtue, and consequently, perpetuating private virtue was

14. Ross, *Liberalism*, in 2 *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 750, 753 (J. Green ed., 1984).

15. Drew McCoy, the leading historian of republican political economy, made this point clearly when he wrote:

American republicans valued property in land primarily because it provided personal independence. The individual with direct access to the productive resources of nature need not rely on other men, or any man, for the basic means of existence. . . . The personal independence that resulted from the ownership of land permitted a citizen to participate responsibly in the political process, for it allowed him to pursue spontaneously the common or public good, rather than the narrow interest of the men—or the government—on whom he depended for his support.

D. McCoy, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 68 (1980). See also J. Pocock, *supra* note 10, at 423-461.

16. *THE FEDERALIST* No. 73, at 441 (A. Hamilton) (C. Rossiter ed. 1961).

17. See Crèvecoeur's sentimental discussion of the effects of farming and contact with the soil. J. CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 35-64 (1782, Dutton ed. 1957).

believed essential to the survival of republican government.¹⁸ Manufacturing, commerce, and government debt were thought to be destructive of both virtue and autonomy because they worked to separate citizens from the land.

Republican values and the virtue necessary to their preservation were epitomized by Cincinnatus in Republican Rome and by George Washington in Revolutionary America.¹⁹ Neither sought power over his fellows but neither refused the community his time, his property, and even his life when the needs of the republic demanded service and sacrifice. The virtues that both of these men displayed were rooted in close association with the land, in the simple virtues learned from agrarian pursuits, and the habits of economic and social independence these pursuits generated.²⁰

Republicanism's enemy was manufacturing and commerce—though not all commerce²¹—because, as Thomas Jefferson wrote, these vocations made men “depend[ent] . . . on [the] casualties and caprice of customers.”²² The pursuit of wealth and enervating luxuries lured men to the pursuit of self-interest and the engrossing of power over their fellow men. This kind of economy fostered dependency in most men by making them subject to the economic will of others. It also separated common people from the land and pushed them into wretched cities which would become like those of Europe. Once deprived of economic autonomy, men could no longer main-

18. “Virtue” was a critically important concept for republicans but it was something of a chameleon, and historians have had difficulty agreeing upon its precise definition. Part of the current debate about the period of the Founding involves serious disagreements about the content of terms like virtue, republicanism, and liberalism in their late eighteenth century incarnations. The best definition of virtue is that offered by Gordon Wood and restated succinctly by Lance Banning. Wood defined “public virtue” as the “willingness of the individual to sacrifice his private interests for the good of the community.” G. WOOD, *supra* note 10, at 68. In his book on the ideology of the Jeffersonian Republicans in the 1790's, Banning wrote: “The image of a republic, in this age was most tellingly conveyed by the word ‘virtue,’ which suggested a powerful, communitarian sense of the common good, an individual readiness to sacrifice selfish interest for the interest of the whole.” L. BANNING, *supra* note 12, at 107 (1978).

Forrest McDonald has defined public virtue more broadly. For McDonald, virtue entailed firmness, courage, endurance, industry, frugal living, strength, and, above all, unremitting devotion to the weal of the public's corporate self, the community of virtuous men. It was at once individualistic and communal: individualistic in that no member of the public could be dependent upon any other and still be reckoned a member of the public; communal in that every man gave himself totally to the good of the public as a whole.

F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 70-71 (1985). See also D. MCCOY, *supra* note 15, at 6-7, 68-75, 77-80.

19. See G. WILLS, *CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT* (1984).

20. See T. JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 156-58 (Harper Torchbook ed. 1964).

21. Appleby and McCoy both argue that commerce in agricultural surpluses was considered good because it supported an agrarian based society. See D. MCCOY, *supra* note 15; J. APPLEBY, *supra* note 10, at 39-50, 87-92.

22. T. JEFFERSON, *supra* note 20, at 157.

tain their political independence and would be forced to put personal interest above the public interest.²³

A non-agrarian economy destroyed not only the economic and political autonomy of citizens, it also sapped their virtue. As men lost contact with the land, they lost also the virtuous habits of industry and productive work. In place of these habits, men learned to be self-concerned, to consume, to dominate, and to put unrepugnant barriers between themselves and their fellow countrymen. For many of the revolutionary generation, the survival of liberty and the republic which protected it depended on the preservation of individual economic autonomy and the continuance of an agrarian society.

3. Virtueless Lawyers

How did men who embraced this republican world view look upon lawyers? "[T]he more radical brand of Country thought . . . had always regarded lawyers as a plague and a threat to virtue."²⁴ In the view of these republicans, lawyers lived lives devoid of virtue. Lawyers were completely dependent on others for their bread. Wits and knowledge of the law constituted a lawyer's only capital. The commodity they sold was themselves.²⁵

23. See D. McCoy, *supra* note 15, at 36-39. See also the discussion of limiting suffrage to freeholders which took place in the federal constitutional convention on August 7, 1787. 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 201-205 (1966). Gouverneur Morris there argued:

Give the votes to the people who have no property, and they will sell them to the rich who will be able to buy them. . . . The time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty? . . . Children do not vote. Why? because they want prudence, because they have no will of their own. The ignorant & dependent can be as little trusted with the public interest.

2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 203-204 (1966).

Although Madison believed it would be impolitic to restrict the suffrage, on the merits he agreed with Morris.

Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.

Id. at 203-204.

24. A. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810 xviii (1981).

25. This is obviously not the way the profession sees itself. The codes of professional conduct have always mixed injunctions of loyalty to clients with exhortations to exercise independent professional judgment. See G. SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE LAW (1854); AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS Canons 6, 15 (1908); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8, 1.9, 1.16 (1987). In practice, however,

What republicans viewed as corruption—a fall from independence into subordination, the commitment of one's self to the will of another—lawyers chose as a way of life. This descent from independence was the result of choosing to serve self-interest instead of the common interest. Lawyers consciously abandoned virtue when they entered the profession. The potential for destruction was great. In pursuing their own moral decline, lawyers promoted the destruction of morality in others. The means by which lawyers profited from their own selfishness was to encourage selfishness in their clients. Those republicans who read Blackstone's *Commentaries* would undoubtedly have seen a clear relationship between the increase of laws and lawyers and the decline of virtue.²⁶

This view of lawyers was compounded by the belief that their choice to serve private ends—their clients' and their own—was unprincipled. Lawyers worked for money, not because they believed their work promoted the common good.²⁷ Lawyers promoted extreme individualism because asserting individualist values would increase clashes between the isolated individuals who would inhabit a post-communitarian world. All parties involved in such collisions would need legal representation. The bar would be paid well, over and over again, for its attendance at the birth of such a society. Having fostered chaos, lawyers could reap its fruits. They could batten upon collisions when collisions occurred, profit by selling their expertise in avoiding collisions.²⁸ Critics of the legal profession have found this indictment persuasive. Lawyers, the critics charged, were guilty of intellectual prostitution. Members of the bar encouraged social dissension in order to profit from it.

Benjamin Austin, an articulate republican critic of the profession, first published his views on the subject in 1786 in a series of newspaper essays which he signed "Honestus." In 1819, Austin republished all of the letters in pamphlet form entitled *Observations on the Pernicious Practice of the*

for most lawyers the duty of loyalty represents a higher law within the Codes. The profession's inclination in this direction is reinforced by the lawyer's economic stake in retaining clients. So long as the client does not involve the lawyer in clearly illegal activity, the lawyer is enjoined to serve faithfully.

26. See D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* 56 (1941). Boorstin shows that Blackstone believed the more complex and commercial a society became, the more complicated its legal system would become in response. Republicans seem to have reinterpreted Blackstone's message and seen in the multiplication of laws and lawyers a *cause* of the increasing social complexity instead of its effect.

27. Grayson, *Vice Unmasked, An Essay: Being a Consideration of the Influence of Law Upon the Moral Essence of Man, With Other Reflections*, in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 195 (Cornell ed. 1969).

28. See Kentucky Yeoman, May 24, 1849, at 1, col. 1. See also Honestus [Benjamin Austin], *Observations on the Pernicious Practice of the Law* (1786, 1819), reprinted in 13 AM. J. LEGAL HIST. 244 (1969). Austin was a Boston politician who became a Jeffersonian Republican in the 1790's. He has been described as an impetuous polemicist. See 1 DICTIONARY AM. BIOG. 431. His essays as Honestus appeared in the *Independent Chronicle* in 1786, and were republished in Boston in pamphlet form in 1819. See also *Legerdemain of Law-craft*, 22 DEMOCRATIC REV. 529 (1848).

Law. In one of these essays, Austin wrote: "Nothing surely can be so detestable, as for a man to set up his principles for sale."²⁹ In 1830, another critic uncharitably observed: "[Lawyers] . . . are ready to execute any prescription of either justice or injustice—to lend themselves to any side—to advocate any doctrine. . . ."³⁰ Even some of the bar's defenders expressed disdain for the "promiscuous advocacy" in which some lawyers engaged.³¹ Most bar defenders, however, anchored their arguments firmly in the liberal belief that truth was discoverable only through the clash of advocates.³²

If lack of independence generated a disdain for lawyers in the breasts of good republicans, how could the bar respond? If there was contempt for dependence, the profession could emphasize its professional autonomy. It could avow that clients' control had limits, and that the profession had public responsibilities.³³ Service of isolated individuals must be transmuted into service to the entire community. But the bar's proclaimed independence was not economic. The lawyer's economic existence still depended upon employment as the tool of another's selfishness. If the lawyer was free of *one* master, as the bar proclaimed, his economic survival depended upon service to *many*. The profession has put emphasis through the years on preserving its own autonomy from public control, and has spoken earnestly about preserving the autonomy of individual lawyers from control by their private clients. Even so, the criticism has continued because the plea has been unresponsive to the indictment. From the perspective of many laymen, once lawyers make an occupational commitment to surrender true autonomy in exchange for money, whether or not the advocate retains tactical control of a particular matter is irrelevant.

Although dependence on farming as a source of virtue dwindled in the face of the economic transformation of the United States during the nineteenth century, lawyers did not benefit from the developing attitude which found alternate sources of virtue and independence in productive

29. *Honestus*, *supra* note 28, at 257.

30. See Grayson, *supra* note 27. This charge was of great enough concern to Sharswood, an early formulator of legal ethics, to be addressed in his famous ethics proposals. G. SHARSWOOD, *supra* note 25.

31. DeBow, *Law and Lawyers*, in 19 DEBOW'S REV. 507, 508 (1855). The analogy to prostitution is a recurrent theme in much of the literature which is critical of lawyers. See also P. MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 187 (1965). For a modern discussion of these issues and their implications, see Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

32. See Jackson, *Law and Lawyers. Is the Profession of the Advocate Consistent With Perfect Integrity?*, in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 274, 278 (Cornell ed. 1969). See also J.S. MILL, *ON LIBERTY* 98-101 (Penguin Classics ed. 1985).

33. See Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (for a recent discussion of the social importance of bar independence). His interpretation of the republican view of lawyers is quite different from my own. *Id.* at 9-19. See also R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11-33 (1984). Ferguson argues that lawyers were the spokesmen of republicanism in the early republic. It seems unlikely that the republicans Pocock described would have agreed.

work.³⁴ Few laymen viewed what lawyers did as productive work. Lawyers produced nothing. They built nothing. Instead, lawyers lived off the work of others, grinding producing men down, harassing real producers, and thereby reducing the productive capacities of others.³⁵ Thus, critics could argue that lawyers resisted and undermined the new sources of virtue in the same destructive manner as the bar had the old sources.

The seeming acceptance by lawyers of an apparent philosophy of pure selfishness was disquieting enough. Republican discomfort, however, increased to the level of pain as lawyers were perceived to have aligned themselves with commercial, modernizing interests.³⁶ From the communitarian perspective, active support for these interests did more than cast the weight of the bar against republicanism. Such support also put lawyers in the front rank of those actively engaged in the destruction of republican virtue and the agrarian world capable of sustaining virtue.³⁷ This perspective would explain why many of the most intense expressions of anti-lawyer sentiment have been published during periods of rapid modernization and fundamental change, when pressure to review basic principles and to choose among them was most intense. One would also expect anti-lawyer sentiment to be more pronounced among those who favored the simpler social organization of the pre-commercial agrarian community, and historically this seems to have been true.³⁸

4. Rediscovering Liberalism: The Virtues of Individualism and Autonomy

Liberalism, the other current in American thought, has an older scholarly pedigree in America than republicanism, but the work of Joyce Appleby, Isaac Kramnick, John Diggins, and others has reinvigorated liberalism in recent years. Liberalism emphasized individualism and promised freedom from arbitrary authority in philosophy, religion, politics, and the economy. As formulated by John Locke and Adam Smith, liberalism encouraged the

34. See Kramnick, *supra* note 13, at 18. See also E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970).

35. See Roeber, *supra* note 24, at 251. See Crèvecoeur's famous comment in this regard: [Lawyers] are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root they will extinguish every other vegetable that grows around them. . . . The most ignorant, . . . bungling member of that profession, will, if placed in the most obscure part of the country, promote litigiousness, and amass more wealth without labour, than the most opulent farmer, with all his toils.

J. CREVECOEUR, *supra* note 17, at 135. This was a particularly powerful image for subsequent agrarians who suffered recurring cycles of boom and bust, which led lawyers to put almost constant pressure on debtors in behalf of creditors.

36. See M. HORWITZ, *supra* note 2, at 140-59; R. Newmyer, *Daniel Webster As Tocqueville's Lawyer: The Dartmouth College Case*, 11 AM. J. LEGAL HIST. 127 (1967).

37. A. ROEBER, *supra* note 24, at 231-257.

38. See J. AUERBACH, *supra* note 6.

rights of individuals against a compulsive, interfering state.³⁹ Liberalism emphasized reason and man's power to discern patterns of rationality in nature and in society, rationalized and encouraged the pursuit of self-interest, especially in the economic sphere, and argued that the great locus of productive human activity was the economy, not the public life of the polis. Contrary to republican assumptions, self-actualization would be found in economic activity, not in participation in civic affairs.⁴⁰ In short, liberalism offered a reassuring moral and philosophical base for a modernizing, commercial, entrepreneurial, and pluralistic America.⁴¹ Liberalism also offered a clear intellectual rationale for the adversary system and those attributes of the legal profession that were distasteful to republicans.

In an attempt to identify the point at which American society shifted from a republican to a liberal world view, some historians in the last few years have debated which of these two paradigms, republicanism or liberalism, best describes the ideology of the 1790's. Other historians have traced elements of republicanism well into the nineteenth century. For the purposes of this essay, whether liberalism became preponderant before or after 1800 is of little importance. The fact that evidence exists to support the persistence of some republican ideas as cultural influences at least until the end of the nineteenth century and that liberalism has been predominant at least since early in that century is what is important here.⁴² Although the liberal ideology has waxed stronger and stronger in the last two hundred years of American history, the communitarian republican values survived, providing a sometimes loud and sometimes soft counterpoint to the main liberal theme of a modernizing, aggressively individualistic and pluralistic America, and these communitarian values have colored American attitudes toward the legal profession.

5. Lawyers As Champions of Liberalism

If republican attitudes toward lawyers explain some of the persistent hostility to the profession, especially in the early republic, the contribution of liberalism to popular perceptions of the bar was even more important. Liberalism's attitude toward law and liberals' ambivalence about lawyers offer a clearer explanation for the complexity of the bar's position in America.

Lawyers were clearly perceived as aligned with the liberal side of the debate between liberalism and republicanism. This perceived alignment

39. See D. McCoy, *supra* note 15, at 13-48; J. Appleby, *CAPITALISM AND A NEW SOCIAL ORDER*, *supra* note 10, at 93-97.

40. For a discussion of these "new" nineteenth century values, see J. Hurst, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 3-32 (1964).

41. See Adams, *Republicanism*, in 3 *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 1131 (J. Greene ed. 1984); Ross, *supra* note 14; Smith, *supra* note 10.

42. See Kloppenberg, *supra* note 11; Kramnick, *supra* note 13; *Forum: The Creation of the American Republic, 1776-1787: A Symposium of Views and Reviews*, 44 *WM. & MARY Q.* 549 (1987) (for a sense of the range of possible issues still in dispute).

generated anti-lawyer sentiment among those who entertained a more communitarian perspective and among those who were more antagonistic toward individualist values than the bar has been.

While professing some communitarian values, lawyers and the adversary system lawyers served were and remain closely associated with extreme individualism.⁴³ The adversary model functions in a world inhabited by selfish, aggressive, and isolated individuals in pursuit of private ends within a framework of law and litigation that emphasizes conflict and competition and denies the existence of virtue.⁴⁴ The adversary system focuses disputes, and if played out to the end, the system produces a winner and a loser. The adversary system heightens existing conflict and encourages parties to define their own interests in opposition to the interests of others. In other words, the adversary system encourages clients to act selfishly.⁴⁵ At the same time, the system disconnects the dispute from the parties by transforming the conflict from a personal battle between individuals into a more abstract debate over the application of legal principles. Consider how much more important the dampening of conflict must be to a liberal world inhabited by aggressive individuals than to a republican community that emphasized obligations rather than rights, and harmony rather than conflict.

This transformation of conflict into abstract legal debate forms the basis for the profession's primary claim to usefulness. Here, a lawyer's service to individuals can become public service. By ritualizing disputes lawyers put limits on private conflicts thereby serving the community.⁴⁶ At this level of abstraction, most laymen might concede the bar's usefulness. At the pedestrian level at which people lived day by day, however, lawyers practicing their profession were perceived to serve individual clients exclusively. Lawyers served the fragments, not the whole. To make matters worse, the fragments lawyers served constantly pushed and pulled. Lawyers fought each other and produced heat and noise which disturbed the peace (a mental state) and quiet of others. Perceiving service to communitarian values in such a storm took breadth of vision.⁴⁷

43. Neither lawyers nor the ethical codes which embody the formal standards of the profession discount the public interest. Indeed, much of the literature of the bar consists of accounts of the public contributions of lawyers to American society. Reading about lawyers acting as lawyers rather than as talented citizens, however, reveals that lawyers believe they serve the public interest best by serving their private clients. Indeed, one of the most interesting ethical problems with which the modern bar wrestles is how to define the correct relationship with clients who are not individuals—i.e., corporations, government agencies, and class action clients, among others.

44. See Grayson, *supra* note 27, at 193.

45. See Honestus, *supra* note 28, at 284-285. See also Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 Human Rights 1, 13 (1975).

46. See Honestus, *supra* note 28, at 196-197.

47. See G. SHARSWOOD, *supra* note 25. Sharswood argued that lawyers should not judge the justice or injustice of a client's cause despite popular criticism. The lawyers' duty was "[e]ntire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability. . . ." *Id.* at 23-24. Lawyers

Of course, the popular identification of lawyers with liberal values also helps explain the powerful position of the bar in America. As prominent defenders and justifiers of private rights against public power, the bar was a partner in the liberal struggle for individual autonomy, economic liberty, and limited government. This aspect of the profession's relationship to liberalism predominated in the nineteenth century, and formed a connection to mainline nineteenth century thought that was a great source of power for the profession both before and after the Civil War. Ironically, the bar's success on behalf of what political economists would later label economic laissez-faire contributed to the cultural reevaluation which transformed liberalism at the end of the nineteenth century and early in the twentieth century. But even before the end of the nineteenth century, changes in American society were creating pressures which resulted in the great expansion of law and a dramatic increase in its relative intrusiveness in people's lives. With this expansion and intrusion the power of lawyers grew apace and became more visible to average people.

Perhaps even more important to an understanding of later criticism of lawyers by their ideological allies was the manner in which legal considerations began to impinge on the perceived liberty of active individuals forcing these individuals to involve lawyers in their decisions.⁴⁸ This development is apparent when one considers the changes in the way lawyers practiced their profession in 1860 compared to 1820. By 1860 the profession had begun to specialize in the big cities and the business law firm had started to develop. Lawyers were becoming counsellors as well as litigators, and their business clients were forced to seek their assistance whether the clients liked it or not. Lawyers were masters of the law. Clients became increasingly aware that this professional power over the law gave the bar power over them as well.

6. The Lawyer's Betrayal of Liberalism

a. The Importance of Autonomy

Liberalism, like republicanism, found in autonomy a central ideal, although for reasons very different from those of republicanism. Liberalism

must act in this way because cases must be decided "upon the evidence, and upon the principles of law applicable to the facts," not upon their own *ex parte* opinions of right and wrong. *Id.* at 24-25. Elsewhere in his lecture, however, Sharswood displays some ambivalence about this point. A more complete explanation of the role of lawyers in the adversary system as partisans of individuals is contained in *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

48. Lawrence Friedman has described this expansion of the reach of law in the nineteenth century: "One basic, critical fact of 19th-century law was that the official legal system penetrated, and had to penetrate, deeper and deeper into society." L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 113 (2d ed. 1985). See also A. ROEBER, *supra* note 24. "One can hardly argue with the Country feeling that, in the long run, the rise of lawyers and courts spells the end of the independent man's abilities to handle his own affairs responsibly." *Id.* at 258.

was liberating.⁴⁹ The belief that progress would accelerate if the individual could be freed from the compulsive control of the state was at the heart of liberalism. The freedom to choose was central both for John Locke and Adam Smith, the two most important proponents of liberal political thought and liberal economics. Both Locke and Smith believed that the sum total of individual choices would describe a rational (both reasonable and reasoned) structure free from the magnified distortions that result from the arbitrary action of government.⁵⁰ Pursuing private ends free from external interference, therefore, was not only efficient for individuals but natural and moral as well.⁵¹ This promise of freedom and the rational ordering of society produced the sum of self-interested choices that formed the heart of liberalism's appeal.⁵² Without individual autonomy and the liberating power of choice, the central promise of liberalism was illusory.⁵³

If lawyers were perceived as undermining autonomy and individual choice, they would appear to betray liberalism at its foundation. Hints at such a perception appear in some anti-lawyer literature. In particular, outbursts against lawyer-imposed legal complexity expressed this idea. Legal complexity made choices more difficult and made the exercise of true independence impossible. In addition, legal complexity forced dependence on experts, and when this dependence became apparent, masters experienced

49. See John Stuart Mill's famous essay, *On Liberty*, for an eloquent statement of this aspect of nineteenth century liberalism. See also J. HURST, *supra* note 40, at 8-11.

50. In economics this magic would be wrought by Smith's "invisible hand" and in Locke's politics by man's reasoned understanding of natural law. In defining liberalism Dorothy Ross has written:

The new ethic drew on the Enlightenment view that modern civilization was moving toward increasing wealth and diversification, and that these conditions promised fuller development of the individual's rich and diverse potentialities. Natural principles of economic organization came to be seen as the central factor in progress and economic activity as the foundation of morality. Disciplined by the necessities of the market, self-interest would generate industry and frugality, individual autonomy and mutual trust.

Ross, *supra* note 14, at 753.

51. See L. WEINRIB, *NATURAL LAW AND JUSTICE* 76-83 (1987).

52. See J.S. MILL, *supra* note 32. In his classic work Mill makes the nineteenth century liberal case for liberty. His defense of the pursuit of truth through the clash of opposing ideas strongly resembles theories justifying the adversary system. See *id.* at 75-118.

53. The ideal in Mill's liberalism was as dependent on individual autonomy as republicanism and was equally tied to property. Mill's concern went beyond the restrictions on autonomy imposed by government. He was equally concerned about the coercive power of public opinion.

In respect to all persons but those whose pecuniary circumstances make them independent of the good will of other people, opinion . . . is as efficacious as law; men might as well be imprisoned as excluded from the means of earning their bread. Those whose bread is already secured, and who desire no favours from men in power, or from bodies of men, or from the public, have nothing to fear from the open avowal of any opinions but to be ill-thought of and ill-spoken of, and this it ought not to require a very heroic mould to enable them to bear.

J.S. MILL, *supra* note 32, at 93.

the constraints of servitude, and legal counsellors suffered the hostility reserved for upstarts.⁵⁴

b. Lawyer-Imposed Complexity and the Destruction of Autonomy

Critics of the bar have often berated lawyers for making simple things complicated. Specifically, critics charge that lawyers insinuate themselves into every transaction and bend everything to conform to a legal framework that the bar has devised.⁵⁵ This legal framework is characterized by its foreign language, its encrypted landmarks, and its strange and artificial approach to problems.

Many of the most acerbic attacks on the legal profession can be classified as expressions of the rage of disempowered laymen. One frustrated nineteenth century critic of the bar summarized such a charge in an anonymous essay:

The role of lawyers] appears to be to distort plain common sense and truth into all the tortuous twists and sinuosities of which a lawyer's logic is susceptible. . . . With their canine Latin and the perpetual wrangling of opposing counsel, as well as their pertinacious perversity for torturing simple facts—what was originally clear and intelligible, at length becomes such mystification, that to one not initiated into the sophisms and subtleties of legal disquisition, it appears impossible to distinguish between wrong and right.⁵⁶

Even reason itself, and its sibling untutored common sense, became unreliable in the strange universe of the lawyer. Lay judges could be driven to extremes by their determination not to surrender their autonomy of decision to artificial learning of dubious value. For example, Judge John Dudley, a lay judge of the New Hampshire trial court, asserted his own independence and confirmed that of the jury when he charged in a case: "A clear head and an honest heart are wuth [sic] more than all the law of the lawyers. . . . It's our business to do justice between the parties; not by any quirks o' the law out of Coke or Blackstone—books that I never read and never will—but by common sense and common honesty between man and man."⁵⁷ It would be difficult to find another statement which better

54. See Wasserstrom, *supra* note 45, at 15-18.

55. See Honestus, *supra* note 28; *The Abuses of the Law Courts*, 21 DEMOCRATIC REV. 305 (1847).

56. *Legerdemain of Law-Craft*, *supra* note 28, at 530, 534. Honestus lodged a similar complaint when he described some lawyers as "men [who are] endeavoring to perplex and embarrass every judicial proceeding; who are rendering intricate even the most simple principles of law; who are practising the greatest art in order to delay every process. . . ." Honestus, *supra* note 28, at 249-250.

57. This passage is taken from a jury charge dating from the first decade of the nineteenth century. The charge is excerpted in J. ZAINALDIN, *LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION* 83 (1983). It also appears in somewhat altered form in D. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 201 (1958).

exemplifies resistance to substituting "lawyer's sense" for common sense and thereby losing the right and ability to make decisions without professional assistance.⁵⁸

Another mid-nineteenth century essayist addressed the negative popular effect of the lawyer's attack on autonomy directly. He argued that hostility to lawyers arose in part from the profession's intrusiveness. The practice of law "vitally affects, and authoritatively determines the most sensitive interests of society, regulating every man's conduct and interfering in every man's business."⁵⁹ Lawyer professionalism with its demand for expertise, its jargon, and its arcane learning, conspired to drain power from the lay person and invest power in the lawyer.⁶⁰ What adult, even today, would not be angered by this reallocation of power? Imagine the effect upon enterprising nineteenth century Americans, bred to an aggressive individualism and an ethic which encouraged the almost unbounded, headlong pursuit of wealth and power.

III. A LEGAL ARISTOCRACY?

A. *Lawyers and the Misappropriation of the Law*

The increasing complexity of the law generated another complaint. To those who believed that the profession's growing sophistication,⁶¹ professionalization, and claim that law was a science represented nothing more than a false and self-serving grab for power, these complexities confirmed earlier suspicions. The appropriation of the law by lawyers fit with other nineteenth century developments and seemed one more example of the conspiracy of the learned against everyone else. The appropriation of law by lawyers, however, was especially pernicious. In a democratic republic which was forced more and more to look to law for limiting principles, the law must be comprehensible. In others words, the law must be accessible to simple understanding.⁶² The codification movement in the early nineteenth century was an articulate manifestation of this belief in accessibility.⁶³ The drive to mandate the use of "plain English" in legal documents in recent years is a modern example of the same attitude.

58. See P. MILLER, *supra* note 31, at 99-104.

59. Kettell, *The American Bar*, 28 DEMOCRATIC REV. 195, 198 (1851). See also P. MILLER, *supra* note 31, at 102.

60. See Strauss, *Toward a Revised Model of the Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1988) (for a discussion of the problem of control in the attorney-client relationship).

61. Sophistication is a wonderfully expressive word. Is it the end product of the efforts of sophists?

62. Honestus, *supra* note 28, at 253, 263.

63. See Field, *Reform in the Legal Profession and the Laws* (Mar. 23, 1855), in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 290 (Cornell ed. 1969).

On the other hand, for those who accepted these changes as progress, these developments would offer a justification for the elevation of lawyers as professionals above the common mass. These changes increased the profession's already substantial prestige.

Certainly, some anti-lawyer sentiment rested upon popular discontent over the perceived appropriation of law by lawyers. This appropriation undermined both the republican and the liberal ideals of individual autonomy, and betrayed the hope of both that the law could be comprehensible to all—that the law could and should belong to the entire community. The combination of complexity and jargon denied laymen the right to understand for themselves the rules by which they must live. Some attacks on the profession or on the common law were actually arguments against the artificiality which discredited both. Honestus wrote with great clarity upon this point.⁶⁴

Less well-known critics expressed much the same idea. One particularly incensed mid-nineteenth century critic of the legal profession used more inflammatory rhetoric when he wrote:

The disempowerment of nonlawyers] . . . results from the operation of the technicalities of the laws, and the arbitrary rules, forms, fictions and falsehoods of the laws; . . . invented by lawyers, and introduced into the laws and the administration of justice by lawyers and Judges, to obscure the laws for the benefit of lawyers; to prevent the people from understanding the legal methods of prosecuting and defending their rights; to make the laws a source of endless confusion, vice, and litigation among the people; to involve the rights of the people in all the mazes of legal and technical jargon, for the benefit of lawyers; to enable lawyers and others to fleece the people with impunity. . . .⁶⁵

Lawyers could be viewed as sapping client autonomy at the structural level by creating and manipulating a pervasive legal framework that restrained and constrained social, legal, and economic decisionmaking. Lawyers also appeared to dilute and to destroy client autonomy in the interpersonal relations between individual lawyers and their individual clients.

64. See Honestus, *supra* note 28, at 257-258. See also Sampson, *An Anniversary Discourse . . . Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law* (Dec. 6, 1823), in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 131-132 (Cornell 1969).

65. This quotation from something referred to as *The Political Guide* is drawn from a lengthy attack on the legal profession which covered four columns on the front page of the *Kentucky Yeoman*, one of the leading Democratic newspapers in Kentucky at the time (1849). The article closes with the following interesting couplet:

“To rouse up the slumbering virtues of the land,
And against *corruption* make one glorious stand?”

There can be no doubt that this is a cry for a return to republican values, even if the author had not planted a red flag by signing his article “Jefferson.” *Kentucky Yeoman*, May 24, 1849, at 1, col. 2. See also Wells, *Law Reform*, 21 *DEMOCRATIC REV.* 1 (1847).

Professionalism—training, jargon, and separate status—opened and maintained a gulf between the client and the lawyer. The client was forced to put himself completely in the hands of the lawyer, and the client had no reliable way of evaluating the quality of the services he received. The client's expertise in other fields, mature judgment, and common sense offered unreliable guidance once he moved into the lawyers' world.

At least at one level, this kind of attack on lawyers articulates the angry complaint of any autonomous adult forced into the role of dependent child. Even when the lawyer performed his function in the manner later commanded by the ethical codes, leaving decisions as to the goals of representation—the ultimate decisions—to the client, all of the client's choices were constrained and shaped by the advice the lawyer offered and by the information about the legal context of alternatives the lawyer gave.⁶⁶

Dependence and loss of control frustrate and irritate. Liberal Americans felt these emotions acutely precisely because dependence on lawyers forced these individuals to surrender much of the individual autonomy that they had struggled to obtain and that our legal system had, in theory, developed to preserve. The fact that those persons most likely to have direct professional contact with lawyers were people of substance further exacerbated these feelings. Persons of substance were the persons involved in economic activity. These individuals had confidence in their own capacities. Such persons would feel more acutely than others a lawyer-imposed sense of incapacity.

B. A Society Run by Lawyers

1. The "Toils" of the Law

Ironically, lawyers, who championed the liberal cause thereby alienating communitarians, immediately set about constructing what must have appeared to libertarians as a progressively more and more complicated web of law. While espousing individual freedom in the abstract, lawyers left individuals progressively less room for the independent exercise of choice. Once freed from traditional regulators of conduct—familial, religious, and communal institutions—the remaining framework of restraint—the law—had to expand and assume many of the tasks formerly assigned to other loci of control. Law became, therefore, noticeably more chafing. Consequently, lawyers, the architects and engineers of law, became progressively more annoying. Particularly in the twentieth century, modern lay-Gullivers have become enmeshed in the toils spun and secured by lawyer-Lilliputions—legislators, regulators, administrators, judges, and public and private ad-

66. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1987). *See also* Strauss, *supra* note 60.

vocates. Consequently, people ensnared have struggled and bellowed with anger against the people holding the ropes—the lawyers.⁶⁷

Nineteenth century Americans became law focused, in part because there was so little else to hold them together.⁶⁸ The triumph of liberalism in the late eighteenth and early nineteenth centuries liberated powerful centrifugal forces which worked to detach individuals from traditional regulators of conduct and to encourage isolated, predatory behavior. These changes increased American dependence on the centripetal power of law, and the apotheosis of law entailed the elevation of lawyers, the law's "high priests."⁶⁹ Imagining the liberal triumph without the correlative triumph of the legal profession is nearly impossible. There is an inevitability to this equation. The displacement of other constraining institutions by law, the victory of the liberal ideal of the rule of law, and the accompanying displacement of old elites, all worked so much in favor of the bar that many articulate Americans came to believe that lawyers had somehow anticipated the effects of such changes and conspired to achieve them. Therefore, in the lawyer and liberal moment of victory in the liberal struggle against other sources of authority allies became enemies.

The liberal pursuit of freedom came to appear less a struggle to destroy arbitrary external authority than a struggle to run lawyers to the top of the social heap. Consequently, lawyers could be indicted for a conspiratorial betrayal of their social allies and for the grossest kind of self-serving hypocrisy. Lawyers could be charged with preaching Locke to others while secretly acting upon Hobbesian principles themselves. Those who might have acquiesced quietly in the growth of the legal brier patch would not accept passively the apparent self-promotion of the bar. The rule of law was supposed to promote egalitarianism.⁷⁰ Nonlawyers never intended the rule of law to result in the permanent gentrification of the legal profession. The constitution of a legal aristocracy, to borrow Tocqueville's famous image, was galling for the old aristocrats. It was even more distasteful for those who had assumed that they, not their lawyers, would become the new aristocrats. Neither the old gentry nor the new hopefuls could suffer the elevation of the profession in silence.

2. Political Domination

Resentment of the lawyer-imposed loss of autonomy in matters of private law spilled over into criticism of the public role of the bar. The

67. Thinking about law in this way is so widespread that *Webster's Unabridged Dictionary*, after defining "toil" as "something by which one is held fast, entangled, or involved in seemingly inextricable difficulties" offers "in the toils of the law" as an example of common usage. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2404 (1971).

68. See Stevens, *The Nature of a Learned Profession*, 34 J. LEGAL EDUC. 577 (1984).

69. Daniel Boorstin refers to post-Civil War lawyers as "high priests." D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 416 (1973). Gerard Gawalt also used this image in the title of a collection of essays about lawyers. *THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL WAR AMERICA* (G. Gawalt ed. 1984).

70. See J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER*, *supra* note 10.

special status of the bar was driven home unambiguously by the profession's high political profile. Because law came to provide the fundamental structure of our liberal society, lawyers occupied a privileged position in our public life.⁷¹

Lawyers' domination of politics goes back to the origins of history in America. Lawyers were prominent during the imperial crisis and as revolutionaries making a revolution in the defense of law, both English and natural.⁷² Lawyers were prominent among the Founders, enshrining the special status of law in the American Constitution. Lawyers have been grossly overrepresented in American political life ever since.⁷³ The bar has pointed periodically to these facts with pride while the bar's critics periodically have accused lawyers of usurping the political birthright of their fellow countrymen.⁷⁴

For republican-minded opponents of the profession, the role of lawyers in American politics was destructive in four ways. First, because lawyers lacked virtue, lawyers would champion the commercial cosmopolitan position in public debate, consequently destroying the social and economic foundations upon which republican virtue rested. Second, by engrossing offices and public duties, lawyers prevented laymen from fulfilling themselves by means of full political participation. By displacing ordinary citizens from political life, lawyers denied laymen their republican birthright.⁷⁵ Third,

71. The legal profession, by a very natural tendency, absorbs all political office and emolument. The habit of public discussion and the transaction of public business, give to the professional jurist a facility and confidence, which too many good-natured folks regard as the highest qualifications for confidential trusts; and he stands out the most prominent man for whatever lucrative or honorable station may be thought worthy of his talents. His boldness prompts him to pretension, while the modesty of the private citizen opposes no obstacle to his ambition, and he soon finds himself installed in a place, which, had virtue and true merit alone been consulted, might have been possessed by some less assuming aspirant.

The Abuses of the Law Courts, *supra* note 55, at 309. The author of this piece goes on to argue that the influence of lawyers in the legislatures and the "public counsels of the nation," will "tickle the ear or challenge the admiration of some young Pericles . . . at the expense of sound sense and judgment, . . . engender[ing] a false taste for the light and frivolous, and disparag[ing] the simple Roman manners of a republican people." *Id.* at 309-310. See also Stevens, *supra* note 68. One of the central themes of *Justice Without Law?* is the substitution of law for community and for the other elements which "glue" a society together. See J. AUERBACH, *supra* note 6.

72. See F. McDONALD, *supra* note 18.

73. J. HURST, *supra* note 1, at 352-56 (1950); R. WOOSTER, *POLITICS, PLANTERS AND PLAIN FOLK: COURTHOUSE AND STATEHOUSE IN THE UPPER SOUTH, 1850-1860* (1975); Metcalf, *The Profession in the Political History of the United States*, 16 YALE L.J. 182, 183 (1907).

74. See Pound, *The Lay Tradition As To the Lawyer*, 12 MICH. L. REV. 627, 629 (1914). A shrill example of the latter is the letter signed "Jefferson" which appeared in the Kentucky Yeoman on May 24, 1849. See Kentucky Yeoman, *supra* note 65.

75. "[T]he almost inevitable promotion that follows in the wake of the legal profession, is calculated to paralyze the energies of the non-professional classes, and prevent that acquaintance with political science, which would result from a different system. . . ." *The Abuse of the Law Courts*, *supra* note 55, at 310. See also "Jefferson" in the Kentucky Yeoman, *supra* note 65.

lawyers participated in politics for the wrong reasons. Lawyers sought public office for selfish, self-promotional reasons, sought the spotlight in order to display their skills and to attract clients, and sought power in order to maintain the complexity of the law in order to assure that law would continue to be a mystery in the sole possession of lawyers. Thus, lawyers as politicians guaranteed confusion, contention, and litigation, and the continued production of grist for the lawyer's professional mill.⁷⁶ Fourth, lawyers were less worthy of public trust than laymen because the legal occupation made lawyers dependent and practiced liars.⁷⁷

Lawyer political dominance was also problematic for liberals. One important goal of liberalism was to assure social equality to individuals. This goal was to be achieved by destroying distorting privileges and by enshrining the rule of law. By elevating law above all other institutions, however, liberalism also elevated lawyers above their fellow citizens.⁷⁸ Even worse, if elevation of the bar was the result of the crafty selfishness of the profession, how could lawyers be expected to use the power they had thereby gained? The clear answer to many could only have been selfishly. Critics could reasonably fear the worst from political lawyers. The lessons of history where lawyers were concerned must be understood in the light of the working assumptions of nineteenth century liberalism. Individuals acted selfishly for calculated gain. The pursuit of self-interest in the economic sphere was good because activities grounded on self-interest would produce the greatest good for the greatest number. Such behavior would create wealth by increasing productivity and raising the standard of living for all.

Politics, however, was another matter. Early nineteenth century Americans' republican political roots told them that the pursuit of self-interest in public life would lead by one road or another to tyranny. Disinterestedness was best in the political realm, and both republicanism and liberal experience taught that lawyers were the least disinterested of men. When these assumptions about lawyers' bad motives in public life were added to the bar's ability to understand and manipulate laws in ways nonlawyers could not comprehend, the perceived potential for abuse was staggering. The geometric increase in the complexity of nineteenth century society and the growing number of laws which regulated that society made lawyers as indispensable

76. See "Jefferson" in Kentucky Yeoman, *supra* note 65. This idea is a central issue for Honestus. He wrote: "Is it not contrary to every principle of propriety to admit men to make laws, who are living upon the practice of them? They surely will ever find it for their interest to make them so indefinite in their construction, as to allow of many plausible objections against them in their future practice." Honestus, *supra* note 28, at 254.

77. Nor would we wish to make an invidious distinction, in moral point of view, between the two classes [lawyers and nonlawyers] of our citizens; yet it is but justice to remark, that the influence which long and confirmed habits of prevarication and artifice naturally exert upon the mind, renders the professional lawyer less worthy of public confidence than the plain and uncontaminated private citizen.

The Abuses of the Law Courts, *supra* note 55, at 309.

78. See Honestus, *supra* note 28, at 270-271.

in political life as in private life. But, republican political assumptions made lawyers appear to the public thoroughly untrustworthy. The public's great fear was that lawyers' political supremacy would permit the bar's selfishness full and disastrous play.

C. *Tocqueville's Lawyers and Jacksonian America*

1. Elitism and the Protection of Private Rights

Alexis de Tocqueville's famous description of the legal profession in America confirmed another popular suspicion about the bar. In his famous discussion of American society, *Democracy in America*, Tocqueville described the bar as aristocratic, conservative, and anti-democratic in its opinions.⁷⁹ He characterized the bar's political role in terms which have rankled democrats ever since, and encouraged Americans to see lawyers as a unitary interest rather than a collection of diverse individuals. Tocqueville wrote:

When the American people is intoxicated by passion, or carried away by impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counsellors, who secretly oppose their aristocratic propensities to its democratic instincts, their superstitious attachment to what is antique to its love of novelty, their narrow views to its immense designs, and their habitual procrastination to its ardent impatience.⁸⁰

This characterization was clearly double-edged when loosed in Jacksonian America. If Tocqueville was correct in his understanding of the bar as a new aristocracy, then lawyers were guilty of an anti-egalitarian heresy and lawyers would have to be brought down. Lawyers would be a permanent structural irritant, a denial of democratic values to be encountered constantly in politics and ripe for democratic attack. On the other hand, men of property had always recognized the potential for excess inherent in popular government. If the bar itself could be reconstituted along democratic lines, the functions Tocqueville assigned to it might prove useful.

Tocqueville's intent was not to fuel hostility to the bar. Indeed, Tocqueville clearly believed that the attributes he associated with lawyers were beneficial to American society. Tocqueville not only sought to describe American democracy, but also to find elements unique to American society that would permit the freedom which the new country promised to survive. He found one such element in the legal profession.

Tocqueville saw in the majority will the threat of a tyranny both familiar and yet entirely new. The threat was familiar because it portended to produce a debilitating compulsion to uniformity. It was new because its

79. A. TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 272-80 (H. Reeve trans. ed. 1945).

80. *Id.* at 278.

authority would be far more pervasive and compelling than anything experienced by Europe before the advent of modern totalitarianism. In Tocqueville's view, the excesses of democracy he found in America needed restraint if democracy was to survive in substance as well as in form. The legal profession he described was one institution which could serve "to neutralize the vices inherent in popular government."⁸¹ One should not overlook this positive implication of Tocqueville's critique. He asked a familiar question: How could America avoid a tyranny of the majority? How could a society committed to popular sovereignty and majority rule protect minority rights?

In his classic, *The Wealth of Nations*, Adam Smith named the protection of property as one of the three functions that government would retain in the post-mercantilist, liberal world for which he pled. The same problem—the means for the protection of a propertied minority against majority injustice—had been faced by Americans before Tocqueville, and continued to be discussed after him. This problem was certainly a fundamental theme in the Constitutional Convention of 1787, and has remained a fundamental problem ever since, though recast in the twentieth century in terms of the protection of rights other than property.

2. The Consolidation of Bar Power

a. Jacksonian Egalitarianism

The problem Tocqueville articulated and the place that he assigned the legal profession in its solution proved, on balance, a source of strength to the bar. The reconciliation of majority rule with minority rights, especially property rights, had troubled the Founders. The Founders had looked also to the legal profession—as practitioners and as judges—for a solution, and the profession had accepted the burden.⁸² If lawyers could fulfill this function, they would be worth the price they would exact in exchange. If serving in this role could make the lawyer a hero in the abstract, however, it also assured that the majority would always find him an obstructing villain in any particular case.

81. *Id.*

82. It would be difficult to argue that the Founders at Philadelphia had not assumed the existence of judicial review—assigning, at least in part, the defense of minorities to the courts. See M. FARRAND, *supra* note 23, at 73-83, 298-299, 375-376, 390-391, 440; THE FEDERALIST NOS. 78-81, at 464-491 (A. Hamilton) (C. Rossiter ed. 1961). There can be no doubt that nineteenth century lawyers embraced this role.

The advocate not infrequently finds himself . . . putting at hazard the popularity of a life devoted to the public service. . . . It is then, that the shouts of the multitude drown the still, small voice of the unsheltered sufferer. It is then, that the victim bound for immolation; and the advocate stands alone, to maintain the supremacy of the law against power, and numbers, and public applause, and private wealth.

Story, *Discourse Pronounced Upon the Inauguration of the Author*, in MILLER, THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 181.

The Jacksonians of the 1830's were less willing than the Founders to permit an elite bar to enjoy such power. If the common man would not readily tolerate an elitist profession, however, he might abide an open profession which served so useful a purpose as to restrain public passions and protect property. For the Jacksonians, as for the Founders, the bar's abhorrence of "arbitrary power"⁸³ was serviceable for public ends.

Significantly, the Jacksonian attacks on the legal profession focused on opening the profession to all. Even the Jacksonians did not reject the role Tocqueville assigned to the bar.

The bar's defenders argued that the profession was open to all and included members from divergent backgrounds.⁸⁴ Bar membership was constantly changing and this fact prevented any long-term "consistency of purpose" different from the purposes of the polity as a whole.⁸⁵ Except for relatively short periods of time in relatively few localities, the legal profession has been open enough so that any white male could aspire to membership.⁸⁶ This openness did not mean that all levels of the bar were open to everyone.

83. A. Toqueville, *supra* note 79, at 275.

84. See Minor, *The Legal Profession*, 13 S. & W. LITERARY MESSENGER 356, 357-358 (1847). Benjamin Minor was the lawyer-editor of this journal. There is still debate about whether the bar generally has been open to most Americans. Obviously, any discussion of this question must begin with the recognition that through most of our history the test of the democratic character of institutions was whether they were open to all white male adults, not whether they were open to women and minorities. I am interested here not in the reality, but with the perception of openness. If the bar was perceived as open generally to white males, it would have been viewed by most people as democratic. See Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)* 12 AM. J. LEGAL HIST. 306 (1968).

85. Minor, *supra* note 84, at 357-58. It is interesting that Minor did not discuss the difference between laymen and lawyers produced by legal training and practice. He rejected Tocqueville's suggestion that lawyers have their own anti-democratic program. He did not deny that lawyers may proceed more slowly and deliberately in forming opinions or in acting upon their views once developed. Minor leaves open the possibility that differences between laymen and lawyers do exist in their attitudes toward law, individualism, self-interest, and the complexity of the world through which they move, and this possibility requires a revision of Tocqueville's argument, rather than its rejection. The question is not whether Tocqueville was right about the substantive differences between laymen and lawyers which he discussed, but rather whether the search for such differences could legitimately continue. As this essay makes clear, I believe differences do exist but that these differences grow out of legal training and methods of thought and are exhibited in the choice of means rather than in the choice of ends.

After a careful study of members of the Massachusetts bar between 1790 and 1860, Gerard Gawalt concluded that lawyer politicians did not form a homogeneous group. He wrote: "For lawyers in politics, there was no consensus beyond participation [in the period 1790 to 1860] . . . [T]rained lawyers were associated with every major political party or faction." Gawalt further stated that his evidence did not support the hypothesis that lawyers belonged chiefly to the conservative parties. Instead, he wrote: "Lawyers, like other politicians, reflected their constituencies." G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS (1740-1840)* 95 (1979).

86. See G. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS (1760-1840)* (1979) (for a careful discussion of the attempt to keep the early Massachusetts bar small and "socially respectable"); L. Friedman, *supra* note 48, at 303-318.

The elite bar, especially in the larger cities of the United States, has been much less open to social outsiders than the profession as a whole, and this pattern persists today.⁸⁷ Certainly after the Jacksonians finished "reforming" the legal profession by diluting admission requirements, the plea of openness became plausible.

Roscoe Pound was mistaken when he argued that the Jacksonian attacks on the bar in the 1820's and 1830's undermined the legal profession. Their attacks were aimed not at the role of lawyers in American society, but at the imagined elitism of the bar in some localities.⁸⁸ Even as Tocqueville wrote, this elitist bar was passing away in the few places where it had existed and had failed to disintegrate earlier. By reforming the elitist image of the bar, the Jacksonians greatly strengthened the profession. By recasting the bar's image, the Jacksonians transformed the bar into the kind of institution that democracy-minded Americans could accept and integrate into their new society.

More important than the reality of openness, however, was the popular *perception* that this profession of power, influence, and high social status was open to all. The opportunity for upward social and economic mobility provided by the legal profession has been a truism in American culture. Lawyers cultivated this popular view especially during the nineteenth century.⁸⁹ To some extent, the opportunity has been real. In recent times some critics of the legal profession have even expressed the concern that the profession is too attractive; that law recruits too many talented people thereby impoverishing other necessary and more productive occupations.⁹⁰

This perceived openness of the profession has strengthened the bar because lawyers have come to symbolize, at least in this respect, the republican ideal of equality among citizens and the liberal ideal of individualism and success based on competition and merit.

b. Lawyers and the Management of Change

Lawyers' "disinclination to innovate" served another useful purpose. The disinclination provided continuity and some measure of stability to a

87. See J. AUERBACH, *UNEQUAL JUSTICE* (1976).

88. The Jacksonian attack on the legal profession was in some ways analogous to their attack on corporations. Both targets served as symbols of special privilege and of a perceived elitist control of fundamental institutions. However strident the rhetoric, the Jacksonians wanted to outlaw neither corporations nor the bar. What they wanted was for incorporation to be generally available to the "common man" and for the bar to be open to all (white adult males).

89. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, 136-90 (1976); Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269 (1971). This argument runs through the popular collective biographies of the legal profession published during the nineteenth and early twentieth centuries. See *THE LAWYERS AND LAWMAKERS OF KENTUCKY* (H. Levin ed. 1897) (for an example of this genre).

90. See Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

society otherwise renowned for rootlessness and love of change.⁹¹ For republicans, change was especially problematic, because, at least in politics, republicans believed that change led to decline. Change was degeneration. Men with republican ideals, however, also believed in progress in the arts and in science, and advances in these fields undermined republicanism's agrarian base and encouraged modernization. Thomas Jefferson symbolized the dilemma republicans faced. Despite his republican principles, Jefferson pursued the solution to whatever problems, scientific or otherwise, caught his attention. This same attitude in others produced the science and machines which drove the industrial transformation of America.

In the social chaos of the first half of the nineteenth century, the Jacksonians came to recognize the critical role that law must play in holding America together while they were busily remaking the country. As Tocqueville suggested, lawyers could provide continuity with the past when so many other connections to the past were being severed.

The problem of accommodating change is fundamental in all societies, but the problem was acute in nineteenth century America. Few societies have undergone such profound and rapid change with so few stabilizing institutions to ease the way.⁹² If the pressure of change has been more constant in America, it has also been more diffused. Of the European countries, only England's history since the end of the seventeenth century has been as even-tempered as American history. Our remarkable adaptability was the result not of our homogeneity, which disappeared in the course of the nineteenth century, but of the primal role played by law and lawyers. As Tocqueville noted, in America all public questions eventually become legal ones. Private law and public policy are inseparable in America. Law and politics are too completely enmeshed. In both realms lawyers mediate change, and through the courts, lawyers connect law and policy.

One of the most apparent features of nineteenth century America is the extent to which lawyers as judges or in other public and private capacities poured new wine into old bottles, mediating change by disguising it. In law, change rarely sprang suddenly into the open. Rather change grew slowly in the breaking down and building up of rules. Change crept quietly into the common law by means of that insinuating flexibility all lawyers recognize as the common law's identifying feature. Even when something truly new was delivered, the innovation's break with the past was rarely acknowledged.

The additional feature of the American system, and the thing which most accounts for the system's peaceful adaptability, is the fact that we

91. A. TOCQUEVILLE, *supra* note 79, at 279.

92. Of course, the absence of "stabilizing" institutions like an aristocracy, a monarchy, or an established religion, has been a benefit as well as a burden. Arguably, less entrenched resistance to change has resulted from the absence of these institutions. With the exception of the blood shed over the abolition of slavery, Americans have not progressed in the European style of alternating periods of revolutionary convulsion with periods of reaction. With the exception of the Civil War, Americans have adapted peacefully to change.

have accepted the application of private law techniques to the public law arena. The language of the Constitution and public discourse remains the same while the meaning changes. The conventions of American public life are evolutionary because our legal system abhors discontinuity and our public life is made in the legal system's image. In this context, the words that Shakespeare put into the mouth of a true revolutionary in *Henry VI*, part 2, should have special meaning for true radicals in America.

So long as Americans want reassurance that they are not changing while they undergo successive transformations, Americans will need lawyers and the stability the Anglo-American legal method offers. This method applied to our public as well as to our private life permits Americans to pursue progress without risking decline.

This mediation of change also explains why the Jacksonian attack on the bar was fleeting, and as with other anti-lawyer episodes in American history, had no appreciable impact on the long-term status of the profession.⁹³ The ability to manage change has been one of the central services provided by the profession to an America saturated with change and seeking stability, and has proved a persistent source of strength to the profession.

By recognizing the value of legal continuity in the face of fundamental change, and by persuading the public that a new bar created in the public mind by Jacksonian "reforms" belonged to them, the Jacksonians strengthened the profession, helped the bar consolidate its power, and assured its continuing influence in America.

IV. HUMAN NATURE AND THE NEED FOR RESTRAINT

A. "[T]o tame this fierce Creature": The Need For External Restraint

Tocqueville's search for social mechanisms that would provide the restraints necessary to the preservation of democracy suggests another source of the legal profession's power. Despite occasional lapses into optimism, Americans have generally entertained a low opinion of human nature. The depth of this conviction is most apparent in the example of Puritan New England in the colonial period.

The Puritan conception of man provided little basis for optimism. Puritans believed:

[Law was necessary] to restrain . . . unruly Lusts, and keep, within due Bounds, the rampant Passions of Men, which else would soon throw humane Society into the last Disorder and Confusion. . . . [Men] would become fiercer upon one another than Beasts of Prey. . . . [D]oes not this necessitate Laws to tame this fierce

93. It is necessary to distinguish between the role of the profession and its membership. It would be difficult to argue that the activity of the 1820's and 1830's had no effect on membership. What I am arguing here is that the Jacksonian attacks had little or no effect on the profession.

Creature, to bound his Appetites, & bridle his Passions, that he may not be injurious to his Neighbour!⁹⁴

William Penn expressed a similar concern about human nature in 1693 when he wrote:

Not that men know not what is right, their excesses, and wherein they are to blame . . . [b]ut so depraved is human nature that without compulsion . . . too many would not readily be brought to do what they know is right . . . or to avoid what they are satisfied they should not do.⁹⁵

In an otherwise optimistic account of early America, Crèvecoeur penned in 1782 a remarkably Hobbesian reflection on human nature.

We certainly are not that class of beings which we vainly think ourselves to be; man an animal of prey, seems to have rapine and the love of bloodshed implanted in his heart . . . [M]en, like the elements, are always at war; the weakest yield to the most potent; force, subtlety, and malice, always triumph. . . . [W]e love to talk of virtue . . . but when we step forth into active life, if it happen to be in competition with any passion or desire, do we observe it to prevail?⁹⁶

Man needed law and lawyers because man needed restraint. For John Locke, the restraint man needed was built into human nature by God. Reason ruled by divine decree, and man was expected to bend to reason's authority.⁹⁷ But Locke's view of human nature did not emerge triumphant from the Revolution; Hobbes' view did. Even in the Age of Reason, reason did not hold unchallenged sway. John Adams wrote that: "Human Reason and human conscience though I believe there are such things, are not a match, for human passions, human Imaginations, and human Enthusiasm."⁹⁸ Benjamin Franklin, known for his occasional cynicism as well as for his wit, wrote in the same vein in his autobiography: "So convenient a thing it is to be a *reasonable creature*, since it enables one to find or make a reason for everything one has a mind to do."⁹⁹

By the late seventeenth century, early colonial notions of community were in decline even in New England, and the attempt to reassert a utopian

94. John Barnard, *The Throne Established by Righteousness* (1734), in *THE PURITANS: A SOURCEBOOK OF THEIR WRITINGS* 270, 272 (P. Miller and T. Johnson ed. 1938).

95. M. CURTI, *HUMAN NATURE IN AMERICAN THOUGHT: A HISTORY* 39 (1980) (quoting William Penn on human nature).

96. J. CREVECOEUR, *supra* note 17, at 162-163.

97. In his *Two Treatises on Government*, Locke wrote: "The state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law teaches all mankind who will but consult it. . . ." J. LOCKE, *TWO TREATISES OF GOVERNMENT*, II § 6 at 311 (P. Laslett, Mentor rev. ed. 1965).

98. M. CURTI, *supra* note 95, at 105 (quoting John Adams on the limits of reason).

99. B. FRANKLIN, *BENJAMIN FRANKLIN: THE AUTOBIOGRAPHY AND OTHER WRITINGS* 49 (Signet Classic ed. 1961).

view of man at the time of the Revolution foundered on the selfish realities of the War and the 1780's.¹⁰⁰

The authors of the Constitution embodied this low opinion of human nature in the document that became the centerpiece of American law. As Gordon Wood observed some years ago, the Founders, having acknowledged that man could not be reformed, tried to construct a government which was adapted to checking man's sinfulness.¹⁰¹ Forrest McDonald tells us that Hamilton embraced this idea "as a cardinal tenet of his political faith."¹⁰² Hamilton believed that "in contriving any system of government, and fixing the several checks and controls of the Constitution, *every man* ought to be supposed *a knave*; and to have no other end in all his actions, but *private interest*."¹⁰³ These ideas found structural expression in our constitutional system of checks and balances, the separation of powers, and in the Bill of Rights.

Almost seventy-five years ago, Roscoe Pound expressed his agreement. Pound enunciated our deep-seated skepticism that "magistrates can ever be found to whom the royal power of administering justice without law may be safely entrusted."¹⁰⁴ Modern liberalism was rooted in Hobbes as well as in Locke, and Americans were as haunted by the bleakness of Hobbes' vision of the "state of nature" as they were reassured by Locke's vision. One of the great paradoxes of liberal individualism was, and still is, this awareness that without restraint there is no freedom. The American ideal is not simply liberty, but liberty under law. There is tension in this phrase. Liberty under law expresses the desire to expand liberty, but also recognizes the need for external restraint.¹⁰⁵

As Auerbach observed in *Justice Without Law?*, the more extreme our concentration on liberty for the individual, the more we need protection against predatory individuals. Auerbach wrote:

The dependence of Americans upon law, and their apprehension about it, are reciprocal. The exercise of freedom, channeled into the acquisitive pursuit of wealth, requires the vigorous assertion of individual rights, which law protects. It also assures incessant conflict between competing individuals, who are virtually unrestrained

100. See G. WOOD, *supra* note 10, at 393-429; F. McDONALD, *supra* note 18, at 143-183.

101. G. WOOD, *supra* note 10, at 429.

102. See F. McDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 35 (Norton ed. 1979).

103. See *id.* at 35-36 (quoting Hamilton on the proper structure of government).

104. Pound, *supra* note 74, at 638. Is this the source of Auerbach's title?

105. In describing the "Liberal version" of the "ideology of legal science" in the period from 1870 to 1920, Robert Gordon noted the bar's acceptance of its role in support of this assumption. He wrote: "[T]he lawyer was to clarify and make definite the boundaries within which state and individual action must remain to assure maximum autonomy for all, to keep individuals and the state from going outside their spheres, but to remove all restrictions on free action within them; . . ." R. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 97 (G. Geison ed. 1983).

by any purpose beyond self-aggrandizement. The Darwinian jungle is filled with the excitement of the hunt, but it is a scary place because the hunters simultaneously are hunted.¹⁰⁶

To what purpose would one person produce or accumulate property unless society would prevent others from taking it from him? How enjoyable would freedom be if one's life and possessions were subject to the will of any stronger neighbor? A society that adopted liberal individualism as its organizing principle needed law more than a traditional communitarian society in which status, custom, and the pressure of traditional institutions provided limits to private action.¹⁰⁷

This awareness of the need for external restraint goes far toward explaining why laws have proliferated in America, and makes comprehensible the fact that laymen have generally reconciled themselves to the loss of the unbridled autonomy their individualist principles might otherwise urge them to seek. The more negative the society's vision of human nature, the more acutely society will feel the need for limits.

For Americans, the recession of religion, the confrontation with slavery, the ugliness of industrialization, the rise of Freud, and the experience of twentieth century totalitarianism have all reinforced Hobbes and undercut Locke's Enlightenment confidence.

B. *Lawyers Supply Restraint: "The Indispensable Physic"*

"It is with law as with physic," one mid-nineteenth century critic grudgingly wrote of the profession, "the less we have to do with it the better: both commodities being but a negative good, if not a positive evil. Still, so long as diseases and discord disturb the social fabric, pacification and pills seem to be indispensable. . . ."¹⁰⁸ This passage is remarkable for the author's reluctant recognition that a contentious American society needs lawyers. The passage is also interesting for its assumption that "discord" existed independently of lawyers—a concession not all critics have been willing to make—and for his acknowledgment that lawyers "pacify" discord. The critic's particular quarrel was with the price lawyers demanded for their services—"merciless harpies" as he labels them. Given the propensity of nineteenth century conflict in much of America to result in bloodshed if not "pacified" by someone, the role the author assigned to lawyers was an important source of professional strength.

106. J. AUERBACH, *supra* note 6, at 141; see also Walker, *Introductory Lecture On the Dignity of the Law as a Profession*, in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 240 (1962).

107. Hobbes wrote graphically about this darker side of liberalism and many Americans lived it in the late nineteenth and early twentieth centuries.

108. *Legerdemain of Law-Craft*, *supra* note 28, at 529-30. Bloomfield notes that the image of lawyers was changing in the same direction in the 1840's. M. BLOOMFIELD, *supra* note 89, at 136-90. Even Honestus acknowledged the necessity of law. Honestus, *supra* note 28, at 245, 249.

Defenders of the profession have generally been satisfied to accept even such ambiguous praise. One nineteenth century essayist agreed. "No doubt it would be a happy state of society in which lawyers could be dispensed with; for it would be that perfect state in which laws themselves would be superfluous;. . . Let men cease to be contentious and be always ready to do right without compulsion, and lawyers will not trouble them."¹⁰⁹

C. Reason and Passion

As Daniel Howe has explained recently, many of the arguments in support of the Constitution put forward by Hamilton, Madison, and Jay in the *Federalist Papers* assumed that the human personality was compounded of prudence, reason, and passion, which formed a hierarchy of conscious motivation. Unfortunately, passion was the strongest faculty and reason the weakest. Howe argues that "[t]hroughout *The Federalist* appeal is made to immutable scientific laws of human behavior illustrated by historical examples and confirmed by the Americans' own experiment in free government."¹¹⁰ The purpose of political science was to devise mechanisms of government that would reinforce the faculty of reason against passion, which constantly struggled to break through rational restraint.

Suggesting that lawyers were perceived as serving the same function in society as reason did in the individual does not unreasonably stretch the metaphor. Indeed, this suggestion was an essential element of Tocqueville's portrait of the legal profession in America. As reason checks excesses in individuals, lawyers' reasoning in their method of approaching decisions, and their natural conservatism restrained precipitous action in the social body. The Constitution is full of mechanical attempts at strengthening reason against passion through the incorporation of restraint into our fundamental law, and lawyers have drawn strength from their role as reasoning restrainers of passion.¹¹¹

The importance of reason to a post-Enlightenment, liberal society cannot be overemphasized. Rationality and the relationship between reason and passion, between law and disorder, drew the attention of late eighteenth century Americans and has remained central to understanding American attitudes toward law. For our society, reason has played a central role in defining law, and this fact has affected the way laymen viewed lawyers.

In characterizing the major features of American law in the twentieth century, Lawrence Friedman has written:

109. *The Morals and Utility of Lawyers*, 7 WESTERN L.J. 1, 10-11 (1849).

110. Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 485, 491 (1987).

111. A plausible argument can be made that the diffusion of passion is the primary purpose of ritualized dispute resolution. One measure of the success or failure of such a system is its ability to soothe or wear out the disputants, thereby reducing passion to calm or to exhaustion. It is the legal profession's service in this respect which lawyers often cite as one important feature of their utility to the community.

There is, . . . in the 20th century mind, a great straining toward rationality. This trait, which seems fairly general in the western world, has a particularly virulent American form. . . . This state of mind is part of the general debris of a world-wide movement of recent centuries that can be called, for want of a better name, rationalism. Rationalism has been central to Western thought, at least since the Industrial Revolution, if not before.¹¹²

Friedman might have added that given the experience of twentieth century humanity with the seductive and widespread power of irrationality, our determination to cling to reason and the restraint reason promises has been progressively intensified.

Who rules a rational age? Is it the reasonable person or the reasoning person? The modern drive for rationality like all of the other factors this essay has addressed works for and against lawyers. The drive for rationality works for lawyers because they are masters of reasoning. Spotting reasons and giving reasons are at the core of what lawyers do. Reasoning is at the heart of what law schools teach, and reason is the *sine qua non* of judging and legislating. Persuasion is in essence merely the process of selecting and presenting reasons which appeal to the listener. The presence or absence of "good" reasons differentiates "good" from "bad" law. Especially in the late eighteenth and early nineteenth centuries, lawyers claimed logic and reason to be at the core, the very essence of law, and themselves its master.¹¹³ How could this dedication to reasoning, the self-consciously salient feature of the common-law method, not have a powerful appeal both for the individuals and for the age Friedman describes?

However, distinguishing "reasoning" from "reasonable" is possible. To say that the American mind finds the lawyer's *determination to give reasons* appealing is not necessarily to say that American minds affirm the reasons lawyers give. While the legal profession has assured the lay public that there was true magic in the method, there were always some anxious to proclaim that lawyers' reasoning was no more truly magical than other magicians' illusions.

In 1836, Robert Rantoul reacted to Blackstone's famous dictum that the common law was the perfection of human reason with a popular indictment of the quality of the common law's "reason."

The common law is the perfection of human reason,—just as alcohol is the perfection of sugar. The subtle spirit of the common law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason be-

112. L. FRIEDMAN, *supra* note 48, at 664.

113. One could conjure many names to support this proposition but three will suffice: William Blackstone, James Kent, and Joseph Story.

wilders, and perplexes, and plunges its victims into mazes of error.¹¹⁴

In part, the legal profession invited this distinction between common reason and lawyers' reason. Legal reasoning, the bar proclaimed, was different from ordinary reasoning. Law was a science. Law was complex and one must be trained to think like a lawyer before one could fathom lawyers' logic. One dictionary definition of "reasonable" is: "amenable, conformable, or agreeable to reason; just; rational." If the lawyer's reason is different from the layman's reason, does not the bar's reasoning become to the layman, by definition, anti-rational? Would it not appear a corruption of reasoning to those who, unlike Franklin, refused to accept the inherently instrumental character of human reason?¹¹⁵

What if the lawyers' reasoning leads to different conclusions from the reasoning of nonlawyers? In an age as dependent on reason as our own, what place would the popular mind reserve for false reasoners? What consequences would a profession that bent the tool of reason to unreasonable and selfish ends suffer? In the final analysis, the lawyer's perverse reasoning may appear to laymen a corruption of rationality, which goes far toward demonstrating the fallibility of the only guide left to a people cut off from other traditional sources of authority, John Locke and early modern liberalism to the contrary notwithstanding.

Both republicans and eighteenth century liberals believed that there was a divinely created order to the universe, and a place for man and his society within that order. Republicans and liberals believed God gave man the tool of reason to allow him to discover that order and to translate it into human society as law. The effect of bad reasoning by the bar might be expected to strike these laymen as especially perverse. Not only did bad reasoning lead to wrong conclusions, but bad reasoning also threatened to undermine the authority of reason itself. Nonlawyers could see in legal reasoning a determination to prevent the embodiment of natural justice in substantive law by undermining the reliability of the only means available to human beings for recognizing natural law when they saw it, Locke's reason.

114. Rantoul, *Oration at Scituate* (July 4, 1836), in J. ZAINALDIN, *LAW IN ANTEBELLUM SOCIETY: LEGAL CHANGE AND ECONOMIC EXPANSION* 87 (1983). See also Wells, *supra* note 65, at 1-2.

115. Honestus attacked lawyers' reason, and argued that:

'[V]ariety of views' is the slough of the law; and the greatest part of those 'views' arise merely from the sophistry introduced by lawyers; for the more divisions, subdivisions, distinctions, and vague indefinite ideas that are introduced into any controversy, the better for them. In short, the whole bundle of perplexities originate from the metaphysical pleadings of this 'order,' they being studious to show a cause in as many shades as fancy can picture it; and very often the most simple cases are thrown into such a 'variety of views,' as to become a jumble of intricacies. But the principal part of this parade is mere pageantry of profession, calculated to perplex the jury, and deceive the wondering crowd.

Honestus, *supra* note 28, at 283.

V. LAW AS RELIGION: LAWYER POSITIVISM OR LAY NATURAL LAW?

A. Indeterminacy Versus Faith

There is another aspect to the layman's dependence on and suspicion of legal reasoning. Lawyers deny certainty as well as simplicity. Their professional behavior is a perpetual denial of the existence of "simple truths" and a constant reminder that both human beings and the universe they inhabit are harder to understand than most of us would like to believe.

Every proposition is open to argument.¹¹⁶ As Oliver Wendell Holmes wrote long ago in reaction against the mechanical jurisprudence of the 1880's: "[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion, and repose is not the destiny of man."¹¹⁷ Holmes' statement might be taken as the modern lawyer's credo. How would this idea affect Americans who continued to believe with much of the rest of mankind that positive law was made in the image of natural law and that law could and should reflect the divine order?

Of course, formal articulation of such a relativist and instrumental view of law came relatively late in the nineteenth century. Lawyers, however, had acted upon the principle from the beginning. In the universe of eighteenth and nineteenth century conceptions of law, lawyers' willingness to argue any side of a case for money was taken as a culpable display of dishonesty and avarice. Either the advocate was incompetent and unable to evaluate his clients' affairs in consonance with "true" rules of law, or the advocate was dishonest enough to make arguments against what he knew those rules to be.¹¹⁸ Lay belief in certainty and natural law compelled a negative view of lawyers.

As long as lawyers remained silent about their true role as manipulators of law and accepted their role as "discoverers" of law, "honest" lawyers could bask in the law's reflected glow. They were connected to God as

116. See Jackson, *supra* note 32, at 278.

117. H. COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880's* 386 (1950). Compare Honestus, *supra* note 28, at 282-84.

118. Sharswood addressed this charge in 1854.

That lawyers are as often the ministers of injustice as of justice is the common accusation in the mouth of gainsayers against the profession. It is said there must be a right and a wrong side to every lawsuit. In the majority of cases it must be apparent to the advocate, on which side the truth and justice of the cause lie; yet he will maintain, and often with the appearance of warmth and earnestness, that side which he must know to be unjust, and the success of which will be a wrong to the opposite party.

G. SHARSWOOD, *supra* note 25, at 24-25. His response is clear but would hardly have appealed to laymen who believed in absolute justice. He wrote that a dispute must be decided "... upon the evidence, and upon the principles of law applicable to the facts. . . . No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice." *Id.*

surely as was the clergy. Consequently, the conscious betrayal of "justice" by "bad" lawyers, was an offense against God and the natural order as well as against man.¹¹⁹ Good lawyers, those on the "right" side of a case, interpreted law consistently with the natural order. Good lawyers were instruments of God because they interpreted God to man. There was room in such a universe for "legal science," that is, the discovery and application of pre-existing, natural principles. There could be little understanding of adversarial advocacy, however, since such advocacy depended upon the existence of competing perspectives or principles. Honestus made this point when he wrote: "Two lawyers disputing cannot alter the established principles of law, though they may bewilder a Judge. They may perplex the mind, but they cannot inform the judgment."¹²⁰ To make matters worse, if the advocate for the wrong side won, then future cases that followed that advocate's lead would be wrong as well. The evil wrought could extend indefinitely into the future. *Stare decisis* provided stability at a cost because it urged courts to follow bad decisions as well as good ones.

Even eighteenth century lawyers, men like Hamilton, who worked with law day in and day out, could not have accepted the lay view of either law or themselves. Law for lawyers must surely have been positivist and instrumental even before these words were used to describe or lawyers were willing to acknowledge this reality publicly. Lawyers were sensitive to the institutional imperatives of the common-law method in ways laymen were not. Lawyers lived within a system of assumptions that sometimes put institutional values ahead of just results.

119. Harold Berman has recently set out the distinction between natural law theory and positivism succinctly:

Classical natural law theory, . . . is based ultimately on a concept of either fate or providence; it presupposes that the universe itself, including human life, is not only existential but also normative and that it contains an objective standard by which the legality of positive laws are to be judged. Classical legal positivism, in turn, rests ultimately on a concept of the absolute lawmaking power of government; like natural law theory, however, it presupposes the legitimacy of the state and, in addition, the fundamental objectivity and consistency of the body of laws through which the state exercises its authority.

Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach*, 21 U.C. DAVIS L. REV. 549, 552 (1988) (footnotes omitted). He went on elsewhere in the article to explain the effect these differences would have upon people's experience with the legal system.

Before the professionalization and systematization of law, more allowance was given for people's attitudes and beliefs and for their unconscious ideas, their processes of mythical thought. . . . Rights and duties were not bound to the letter of legal texts but instead were a direct manifestation of community values. . . . In this type of legal order, law is not something that is consciously and continuously made and remade by central authorities; there may be occasional legislation, but for the most part law is something that grows out of the patterns and norms of behavior, the folkways and the mores of the community.

Id. at 564-565.

120. Honestus, *supra* note 28, at 255.

The importance placed upon these and the other mentioned values illustrates another fundamental difference of outlook between lawyers and nonlawyers. Lawyers were much less confident that the intuition of human beings was a dependable base upon which to erect a just society.¹²¹ Consequently, there was an inherent contradiction between lay natural conceptions of law and the positivist, process-oriented, instrumental conception of law that came to dominate the consciousness of the legal profession.

This conflict between popular conceptions of law and the law as practiced by lawyers in the American adversary system must have been apparent to thoughtful laymen from the beginning of the modern era. Only when lawyers began talking about what they did in the new language of late nineteenth and early twentieth century jurisprudence, however, did most laymen have the opportunity to understand what many lawyers had known all along: lawyers did not discover law, they created it.¹²² As a result, laymen could now see that lawyers were not acting dishonestly when lawyers made arguments on behalf of their clients that the lawyers might not believe. Lawyers could offer conflicting interpretations in the same case in good faith. This benefit, however, was purchased at the cost of undermining the legitimacy of the common law itself. If law were nothing more than lawyers' arguments adopted by judges, why should judges and lawyers alone make these decisions?

When jurisprudence acknowledged that lawyers made law, jurisprudence validated the suspicions of those who had explained the perversity of some legal results by hypothesizing the separation of natural justice from lawyer-administered law. Rantoul offered a poetic image of this divergence.

While the common law sheds no light, but rather darkness visible, that serves but to discover sights of woe,—justice rises, like the Sun of Righteousness, with healing on his wings, scatters the doubts that torture without end, dispels the mists of scholastic subtlety, and illuminates with the light that lighteth every man that cometh into the world. Older, nobler, clearer, and more glorious, then, is everlasting justice, than ambiguous, base-born purblind, perishable common law.¹²³

When nonlawyers understood that lawyers had relinquished their claimed connection to God and the natural order, there was no "natural" reason left to defer to the bar. Consequently, all that legitimated lawyers' power

121. Sharswood speaks the lawyer's fear of unbounded discretion. It could only "constitute the most appalling of despotisms." G. SHARSWOOD, *supra* note 25, at 25.

122. I do not mean to suggest that most laymen *did in fact* understand the difference between their view of law and the view held by lawyers because jurisprudents began to describe the difference more clearly. Rather, I believe that laymen had realized for some time that lawyers *intended* to act the way they did and that they could justify their actions on jurisprudential grounds. This discovery must have made it appear that the profession was not only wrong about the nature of law, but purposely wrong.

123. Rantoul, *supra* note 113, at 86. See also Wells, *supra* note 65, at 1-2.

and status was social necessity, a negative and shifting source of authority.

Substitution of positivism for natural law theory worked both for and against the legal profession as did the other developments this essay has discussed. If positivism undermined the moral foundation of lawyer's power, it also increased that power by making laymen more dependent on lawyers. The lawyers' ability to evaluate law became unique. Nonlawyers in the past had been able to participate in the evaluation of law. With the divorce of law from nature and morality, the connections between non-legal fields of expertise and the law were irretrievably severed. Only the opinions of legal specialists could be authoritative. As a result, the legal profession could consign its competitors to the fringes of legal discussion. Without the connection between God, nature, and law, the expertise of clergymen, philosophers, and other intellectuals could no longer validate their participation in legal discourse on equal terms with lawyers. Nonlawyers' beliefs and arguments became increasingly irrelevant to lawyers, as lawmakers described a legal system which was created not by God but by man. In such a legal system the law was the province of legal experts making and logically evaluating law. This was a world for lawyers, not laymen.

Of course, this process of displacement reinforced the appropriation of law as the lawyer's exclusive domain. The substitution of positivism for natural law also earned for the bar the undying enmity of those thoughtful, articulate, and influential individuals who continued to believe that they had something important to say about the relationship between God, law, and man. As Roscoe Pound suggested years ago, nonlawyers' feelings of alienation from lawyers' law, and their anger at the closing of the law to nonlawyers may account for anti-lawyer expressions by clerics, especially the repetition of the question: can lawyers act morally.¹²⁴

The general public both accepted and rejected the profession's argument and its appropriation of the law. Positivism appeals to doubters, not to persons of faith, and most Americans doubt, but they also believe. Because of this paradox, Americans are not entirely comfortable with natural law theory, but neither are they entirely comfortable with the uncertain and shifting nature of positivist law.

By training, lawyers lean toward doubt. The familiar first year law student's determined search for law in doctrine-based absolutes slowly gives way under the pressure of faculty prodding to the patterns of analysis and argumentation encapsulated in the phrase "thinking like a lawyer." Each year, we watch our first year law students struggle through a period of disorientation to eventual understanding. In this annual cycle, one can discern broadly held lay attitudes toward law and the discomfort generated as these attitudes are attacked. Law students experience this discomfort as psychological stress as they are acculturated as lawyers. Similar feelings must also have been experienced by reflective laymen as they have endured throughout our history countless "educational" contacts with lawyers and

124. See Pound, *supra* note 103, at 632.

the legal system. But for nonlawyers the process is never completed. Non-lawyers never arrive at the third year students' resignation and acceptance of the rules of the game. If one can go neither forward nor back, one can rage.

Although most Americans have come to accept the liberal values of diversity and pluralism, Americans have not necessarily abandoned their own search for absolutes and resent being told that the law embodies none. America's broad pluralism amounts for most Americans to little more than a willingness to tolerate passively one another's "mistakes." The legal system and the lawyers who serve it go much farther. They affirm toleration instrumentally as a working principle for social peacekeeping. Moreover, they affirm toleration because lawyers have learned to question the existence of abstract truths. This result is primarily the consequence of legal training, although the work lawyers perform also reinforces a relativist view of the world. Lawyers focus on process in part because in their professional view competing truths reflect incomplete formulations and often have equal legitimacy.¹²⁵ The legal system must function in this way, and the system needs lawyers precisely because, although "truths" may inform action by nonlawyers, the absence of consensus on the content of these truths prevents their embodiment in law.

VI. CONCLUSION

The negative image of lawyers in America is one piece of a complicated intellectual puzzle. In this essay I have tried to relate ideas about the legal profession to fundamental intellectual forces at work in eighteenth and nineteenth century America. Among the most important of these were the competing ideologies of republicanism and liberalism. The conflicting pressures produced by the tension between these competing visions account for much of the intensity of feeling about lawyers in American life. The same tensions also offer insights into the sources of the profession's power and durability. Although the collision of these paradigms is most apparent in the years from the American Revolution to the Civil War, republicanism and liberalism have both continued, one waxing and one waning, to exert an influence over our cultural consciousness.

Relating attitudes about lawyers to republicanism and liberalism will help us to understand the unevenness of hostile popular sentiment about the bar, connecting anti-lawyer expressions to larger developments. It may also help us to understand the extent to which criticism of lawyers reflects dissatisfaction with the ideology and structural role of lawyers as opposed to the way individual lawyers have practiced their profession. This understanding should encourage us to consider whether public attitudes toward

125. This idea is at the heart of John Stuart Mill's liberal classic *On Liberty*. See also Richardson, *An Address Delivered Before the Members of the Norfolk Bar* (Feb. 25, 1837), in P. MILLER, *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 233 (Cornell 1969); Jackson, *supra* note 32, at 278.

the bar have been related to deviant or professionally appropriate behavior by lawyers.

Identification with extreme individualism alienated republicans. But this identification also aligned the bar with the dominant American paradigm of aggressive individualism and enhanced the importance of the ritualized dispute resolution process over which lawyers presided. The bar gained allies among supporters of liberal individualism only to alienate these supporters as the profession emerged over the course of the nineteenth century as an intrusive elite with perceived pretensions to domination.

By accepting the egalitarian admission requirements forced on the profession by the Jacksonians, the bar succeeded in diffusing some of the popular hostility which the expansion of law generated. But lawyers never formulated a truly democratic vision for the profession. Rather, they accepted the role Tocqueville and the Founders had assigned them. This conception of their role encouraged identification of lawyers with the power of the few against the many. Moreover, it would eventually lead the profession to become so identified with minority rights as to result in further anti-lawyer outbreaks in the late nineteenth and in the twentieth centuries.

Lawyers, however, could always make the mass of Americans hesitate in the determination to enforce the majority's will by reminding their fellow citizens that behind the bar was the law. That law, which the bar served, was the only external restraint available to a society which combined a commitment to liberal individualism with a fundamentally pessimistic view of human nature—a combination which posited the necessity of external restraint while destroying the community-based, non-law sources of such restraint.

This explanation suggests that ambivalence about lawyers reflects a deep popular ambivalence about law itself. For Americans law both rankles and reassures; law is resented and embraced. This essential paradox is captured in the phrase "liberty under law." Americans pursue liberty, but recognize that freedom for themselves is made possible only by the existence of restraints on others. Most Americans realize that individualism can only exist under community protection.

The bar's mixed destiny in America has been to serve both freedom and authority, to struggle constantly to keep these complementary elements in dynamic equilibrium. Much of the popular criticism of lawyers reflects the fact that in particular cases, lawyers often have appeared too dedicated to one or the other of these ideals. But people have experienced their personal contacts with lawyers more often as constricting rather than liberating. Most Americans have encountered the authority aspect of law. They have resented this aspect because they have sought a more complete autonomy than authority permits. Americans have also resented the authority aspect of the law because they believe that authority has been perverted by being turned to the service of lawyers instead of the community. The liberty which the legal system and lawyers help to make possible is abstract. Freedom is a mosaic produced by cementing in place countless

tiles, each of which is experienced individually as autonomy-defeating. Not surprisingly, only the most perceptive people are able to discern, in the actions of lawyers a dedication to freedom.

The ambiguous position of the legal profession in America is also the result of a fundamental disagreement between laymen and lawyers over their respective conceptions of law. Belief in freedom under law has been a central tenet of our culture for good reason. But nonlawyers insist that the law upon which they rely embody moral absolutes—that it be more than what the lawyers say it is. Nonlawyers resist seeing the law as process and search for eternal principles. Precisely because everything else in their lives is in motion, Americans long for a simple authoritative rationality in their laws. When lawyers' conduct, dictated by the adversary system and a relativist and instrumental perception of law, challenges this determination, it generates anger against the bar. The profession's insistence on the indeterminate, positivist character of law in a society devoted to the worship of a nature-based jurisprudence has had an effect similar to that created by pulling back the curtain on the Wizard of Oz. Not surprisingly, when lawyers encounter a deeply felt desire on the part of most Americans to continue believing in the Wizard, lawyers' actions generate consternation and popular anger.

Ironically, each of these intellectual pieces has produced affirmative and negative feelings about lawyers, and the public still seems unable to decide which should predominate. In the end, what people think of lawyers probably reflects their attitude toward particular facets of the profession's message and the level of sophistication the lay decisionmaker brings to the task of observation and decision. Those who see the world as a place of subtle shadings and complex variety are less likely to attack lawyers for entertaining a similar opinion.

All of these elements contribute complexity and diversity to popular attitudes toward lawyers. They account, at least in part, for the discontinuity between what Americans have written and said about the bar, and the way they have treated lawyers. They also suggest that lawyers can have little affirmative impact on lay opinions about the profession as long as the intellectual sources of such attitudes persist. More than anything else the continuing influence of conflicting principles creates popular ambivalence about the bar.

Lawyers do live their lives in America along a cultural fault. Both lawyers and their critics should recognize this fact. Lawyers should look deeper into the charges made against the profession and focus less concern on the superficial sources of this criticism. Nonlawyers should understand that many of their indictments of the bar are criticisms of the world they, not their lawyers, have made. In order to do without lawyers, Americans would have to do without law as they know it. We cannot have the rule of law and reason without accepting, to some extent, the rule of lawyers. Tocqueville saw this more clearly than most of us now understand.

Americans may dream Auerbach's dream of a communitarian America capable of doing justice without law and without lawyers. But when they

awaken, Americans will still find themselves in a Hobbesian universe until they, not their lawyers, choose to remake it.